No.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~435.~~ 263

THE GERMANIA FIRE INSURANCE COMPANY, THE NIAGARA FIRE INSURANCE COMPANY, THE HANOVER FIRE INSURANCE COMPANY, AND THE REPUBLIC FIRE INSURANCE COMPANY, OF NEW YORK, PLAINTIFFS IN ERROR,

VS.

BURWELL E. BOYKIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED OCTOBER 17, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 495.

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1 *Transcript of the record in the case of—*

BURWELL E. BOYKIN, A CITIZEN OF SOUTH CAROLINA,
vs.
THE GERMANIA FIRE INSURANCE COMPANY, THE Niagara Fire Insurance Company, The Hanover Fire Insurance Company, & The Republic Fire Insurance Company, of New York.

THE UNITED STATES OF AMERICA,
District of South Carolina, to wit:

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Columbia, in the district aforesaid, on the fourth Monday in November, 1869, before the Honorable George S. Bryan, judge of the said United States, for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

BURWELL E. BOYKIN, A CITIZEN OF SOUTH CAROLINA
vs.
THE GERMANIA FIRE INSURANCE COMPANY, THE Niagara Fire Insurance Company, The Hanover Fire Insurance Company, & The Republic Fire Insurance Company, of New York.

2 Be it remembered that heretofore, to wit, the first Monday of October, in the year of our Lord one thousand eight hundred and sixty-seven, the said Burwell E. Boykin impleaded the said Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company in an action on promises, as follows:

THE UNITED STATES OF AMERICA,
South Carolina District:

The President of the United States of America to the marshal of the said district, greeting:

You are hereby commanded, without delay, to summon The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, duly incorporated companies under the laws of the State of New York, and residing in said State, wheresoever they may be found within the aforesaid district, so that you compel them to be and appear before the circuit court of the United States of America for the aforesaid circuit and district, at the court to be holden at Greenville, in the said district, on the first Monday in August next, to answer to Burwell E. Boykin, a citizen of the State of South Carolina, in a plea of trespass 3 on the case, and so forth, and also for certain promises and assumptions by the said defendants to the said plaintiff made and not performed, to the damage of said plaintiff twenty thousand dollars. And have you then & there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the United

States of America, at Charleston, in South Carolina, district aforesaid, the first day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and in the 91st year of the sovereignty & independence of the United States of America.

(Signed) PORTER & CONNER,
Plaintiff's Attorneys.

And Simonton & Barker, attorneys for the defendants, accepted service of said writ as follows:

"We accept service for defendants."
(Signed) "SIMONTON AND BARKER."

And upon the first day of April, A. D. 1868, the said Burwell E. Boykin, by Porter & Conner, his attorneys, declared in the circuit court here against the said defendants above named, in words and in the tenor following:

Declaration.

THE UNITED STATES OF AMERICA,
District of South Carolina:

4 The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, The Republic Fire Insurance Company, duly incorporated companies under the laws of the State of New York, and resident in said State, were summoned to answer to Burwell E. Boykin, a citizen and resident of the State of South Carolina, in a plea of trespass on the case, and so forth.

And the said plaintiff complains of said defendants for that whereas the said plaintiff hath heretofore, to wit, on the 21st of November, A. D. eighteen hundred and sixty-six, at Camden, in the State of South Carolina, and within the jurisdiction of this court, caused to be made a certain certificate of insurance, purporting thereby and containing therein that the said defendants, in consideration of a certain premium of two hundred & fifty dollars paid by the said plaintiff to the said defendants, the receipts whereof were acknowledged by the said defendants, the said premium being at the rate of two & a half per cent. on ten thousand dollars, did each to the amount of one fourth part of the said sum of ten thousand dollars, that is to say, each to the amount of twenty-five hundred dollars, insure against loss or damage by fire a certain lot of seed cotton, and the gin-house, in Kershaw District, State
5 of South Carolina, containing the same, that is to say, the sum of nine thousand five hundred dollars on one hundred and five thousand pounds seed cotton, and the sum of five hundred dollars on the gin-house in which said cotton was contained, for a period of three months from the delivery of the certificate of insurance, to wit, from the 21st day of November, A. D. one thousand eight hundred & sixty-six, at noon, to the 21st day of February, A. D. one thousand eight hundred & sixty-seven, at noon, under & subject to the conditions of open fire policy number eight hundred and twelve issued by the said insurance companies. And plaintiff says that a certificate of such insurance, signed by W. D. McDowall, agent of said companies, and countersigned by A. Stoddard, general agent of said companies, was delivered to the plaintiff by the said W. D. McDowall, agent as aforesaid, at Camden, South Carolina, but no open fire policy No. eight hundred & twelve, nor any other fire policy whatever, was delivered, exhibited, or

mentioned to said defendant; nor were the contents and conditions of any such open fire policy then, or at any other time, made known to the said plaintiff by the companies, or by the said W. D. McDowall, agent, or by any other person or persons in behalf of said companies.

And thereupon afterwards, to wit, on the day & year first aforesaid, and in consideration of the payment of the said sum of five
6 hundred and fifty dollars by the said plaintiff to the said defendants as a premium or reward for the insurance of nine thousand five hundred dollars on the said cotton, and of five hundred dollars on the said gin-house in the said certificate mentioned, the said defendants undertook & promised the plaintiff to become insurers to said plaintiff of the said sum of ten thousand dollars on the said cotton & gin-house in manner aforesaid, against loss or damage by fire. And the said defendants then and there, by the said W. D. McDowall, agent, and the said Stoddart, general agent, in that behalf duly subscribed & countersigned the said policy of insurance as such insurers of the said sum of ten thousand dollars on the said cotton & gin-house in manner aforesaid. And the said plaintiff says that the said cotton & gin-house were of great value, to wit, the said cotton of the value of $9,500, and the said gin-house of the value of $500; and that he was then & there, and from then continually afterwards, the owner of said cotton & gin-house, to wit, at Camden aforesaid. And said plaintiff in fact saith that heretofore, to wit, on the   day of   , A. D. 186 , the said cotton and gin-house were wholly lost & consumed by fire, & were wholly lost to plaintiff as owner thereof, to wit, at Camden
7 aforesaid. Of all which premises defendants, on the day & year last mentioned, at Camden aforesaid, had notice, and were then & there requested by plaintiff to pay him the said sum of ten thousand dollars so insured as aforesaid, and which defendants ought to have paid, according to the form and effect of said certificate of insurance, and of their promises & undertakings, at Camden aforesaid.

And whereas heretofore the said defendants afterwards, to wit, on the day & year last aforesaid, was indebted to the plaintiff in the sum of ten thousand dollars, for so much money before that time paid, laid out, & expended to and for the use of defendants, & at their special instance and request; and in a like sum for so much money by the said defendant before that time had and received to & for the use of the plaintiff, and in a like sum for so much money then & there found to be due and owing to said plaintiff by the said defendants on an account had and stated between them. And being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, undertook, and then & there faithfully promised the said plaintiff, to pay him the said last-mentioned sum of money on request.

Yet the said defendants, not regarding their said promises, have
8 not paid the said several sums of money, or any part thereof, to the said plaintiff, although often requested so to do, but to pay the same have hitherto wholly refused, and still do refuse, to pay the same, to the damage of the plaintiff twenty thousand dollars; and therefore he brings suit, &c.

(Signed) PORTER & CONNER,
Pl'ff's Att'ys.

Certificate of fire insurance.

$10,000.

Germania, Hanover, Niagara, and Republic Fire Insurance Companies, of the city of New York.

Date 21 Nov'r, 1866.

OFFICE CAMDEN, S. C.

This is to certify that B. E. Boykin is insured by each of the above-named insurance companies against loss or damage by fire to the amount of one-fourth part of the sum of ten thousand dollars, viz, nine thousand five hundred dollars on 105,000 lbs. seed cotton; also five hundred dollars on gin-house containing the seed cotton, in Kershaw District, So. Ca., for the period of three months from the delivery of this certificate, viz, the 21st Nov'r, A. D. 1866, at noon, to the 21st of February, A. D. 1867, at noon, under & subject to the conditions of open fire 9 policy No. 812, issued by the said insurance companies; and that the premium for such, at the rate of 2½ per cent., amounting to $250, has been paid paid.

(Signed) W. D. McDOWALL, *Ag't.*

On the corner certificate of fire insurance:

To be issued under open policy No. 812.
(Signed) A. STODDARD, *Gen'l Agen't.*

And Simonton & Barker, counsel for defendants, made the following indorsement upon the declaration:

This action, by the consent of the undersigned, was brought jointly instead of severally.

(Signed) SIMONTON & BARKER,
Per CHA'S H. SIMONTON.

And now on the same day of April, A. D. eighteen hundred and sixty-eight, come into court the said defendants by Simonton & Barker, their attorneys, and to the declaration of the said Burwell E. Boykin filed their plea in words and of the tenor as follows:

Non assumpserunt.

SIMONTON & BARKER,
Def'ts' Att'ys.

Upon which plea the plaintiff joined issue as follows:

And the said plaintiff doth the like.

PORTER & CONNER,
Pl'ff's Att'ys.

And on the first Monday of April, A. D. 1868, come again into court the parties aforesaid by their attorneys aforesaid, and upon 10 motion of the said Burwell E. Boykin, by his attorneys, & with the consent of said defendants, by their attorneys, further process of and upon the premises aforesaid is, by order of the court, continued until the 4th Monday in November next; at which said Monday in November, A. D. 1868, come into court the parties aforesaid by their attorneys aforesaid.

1st postea.

Therefore it is commanded that the United States marshal in & for the district of South Carolina do summon forty-eight good & lawful men, to be drawn by ballot according to law, to be and appear before the justices of the said court, to be holden at Columbia on the 18th day of December, 1868, next, by whom, and so forth, because as well, and so forth, and the same day given to the parties aforesaid, &c.

And afterwards, that is to say, on the day & at the place aforesaid, before the justices aforesaid, come as well the said B. E. Boykin, by his attorneys aforesaid, as the said Germania, Niagara, Hanover, & Republic Fire Insurance Companies, by their attorneys aforesaid; and the jurors aforesaid being demanded, some of them, to wit, W'm R. Hunt, foreman, and others, come; and, being drawn by ballot according to law, and sworn of the jury aforesaid to say the truth of the within contained, do on their oath say that the said defendants did promise and assume
in manner & form as the said B. E. Boykin above in his declara-
11 tion has alleged against them, and they assess the damages of
the said B. E. Boykin, by reason of the non-performance of the
said promises, over and above his costs and charges by him about his suit in this behalf expended, to the sum of ten thousand dollars, with interest thereon from the 27th of December, 1866.

Therefore it is considered that the said Burwell E. Boykin do recover against the said The Germania, The Niagara, The Hanover, & The Republic Fire Insurance Companies, the damages so found by the jurors aforesaid, and also six hundred and twenty-four $\frac{50}{100}$ dollars for his costs & charges aforesaid to the said B. E. Boykin by the said court now here with his assent adjudged; which said damages, interest, costs, & charges amount in the whole to twelve thousand and twenty-four $\frac{50}{100}$; and be the said The Germania, The Niagara, The Hanover, and The Republic Fire Insurance Companies in mercy, and so forth.

PORTER & CONNER,
Pl'ff's Att'ys.

Judgment signed & entered this 26th Dec'r, A. D. 1868.
DAN'L HORLBECK,
Cl'k Cir. Ct. S. C. D.

And thereupon the defendants by their said attorneys moved the court for a new trial of the said cause; whereupon the following order was made:

12 *Order, motion for new trial.*

This cause came on to be heard on motion for a new trial; and, after deliberate argument—

It is ordered that the verdict rendered in the above cause, at the November term of the court, A. D. 1868, be, and the same is hereby, set aside, and a new trial be had, provided that the defendants do, on or before the 1st day of December, 1869, execute a bond, with sufficient sureties, to be approved by the court, in the sum of twelve thousand five hundred dollars, ($12,500,) conditioned to pay to the plaintiff the amount of any judgment recovered by the plaintiff in the cause, with all costs accrued & to accrue.

It is further ordered that the testimony taken by commission on the former trial be lodged with the clerk of the court, and kept by him under seal, to be used by either party on the new trial.

Certificate of fire insurance.

$10,000.

Germania, Hanover, Niagara, and Republic Fire Insurance Companies, of the city of New York.

Date 21 Nov'r, 1866.

OFFICE CAMDEN, S. C.

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D. 1867, at noon, under & subject to the conditions of open fire
9 policy No. 812, issued by the said insurance companies; and that
the premium for such, at the rate of 2½ per cent., amounting to
$250, has been paid paid.

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And afterwards, that is to say, on the day & at the place aforesaid, before the justices aforesaid, come as well the said B. E. Boykin, by his attorneys aforesaid, as the said Germania, Niagara, Hanover, & Republic Fire Insurance Companies, by their attorneys aforesaid; and the jurors aforesaid being demanded, some of them, to wit, W'm R. Hunt, foreman, and others, come; and, being drawn by ballot according to law, and sworn of the jury aforesaid to say the truth of the within contained, do on their oath say that the said defendants did promise and assume in manner & form as the said B. E. Boykin above in his declara-
11 tion has alleged against them, and they assess the damages of the said B. E. Boykin, by reason of the non-performance of the said promises, over and above his costs and charges by him about his suit in this behalf expended, to the sum of ten thousand dollars, with interest thereon from the 27th of December, 1866.

Therefore it is considered that the said Burwell E. Boykin do recover against the said The Germania, The Niagara, The Hanover, & The Republic Fire Insurance Companies, the damages so found by the jurors aforesaid, and also six hundred and twenty-four $\frac{50}{100}$ dollars for his costs & charges aforesaid to the said B. E. Boykin by the said court now here with his assent adjudged; which said damages, interest, costs, & charges amount in the whole to twelve thousand and twenty-four $\frac{50}{100}$; and be the said The Germania, The Niagara, The Hanover, and The Republic Fire Insurance Companies in mercy, and so forth.

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Judgment signed & entered this 26th Dec'r, A. D. 1868.
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It is further ordered that the testimony taken by commission on the former trial be lodged with the clerk of the court, and kept by him under seal, to be used by either party on the new trial.

It is further ordered that the plaintiff have leave to amend his declaration, and that the defendant do plead thereto, and the cause be docketed to the ensuing term of the court.

2d Nov'r, 1869.

(Signed) GEO. S. BRYAN,
U. S. Judge Dist. So. Ca.

And in pursuance of said order the plaintiff, Burwell E. Boy-
13 kin, amended his declaration by adding additional counts, in words
and of the tenor following:

Amendment.

And that whereas the said defendants, on the 21st of November, 1866, at Camden, in the State of South Carolina, made & delivered to plaintiffs a certain certificate of insurance, whereby and wherein the said defendants, in consideration of the sum of two hundred and fifty dollars, ($250,) then paid by the plaintiffs to the defendants, and by them received as premium for such insurance at the rate of 2½ per cent., did each insure the said plaintiff against loss or damage by fire to the amount of one-fourth part of the sum of ten thousand dollars, ($10,000,) viz, nine thousand five hundred dollars ($9,500) on one hundred and five thousand pounds of seed cotton, also five hundred dollars ($500) on the gin-house containing the said cotton, in Kershaw District, So. Carolina, for the period of three months from the delivery of said certificate, that is to say, from the 21st day of November, 1866, at noon, to the 21st day of February, A. D. 1867, at noon, under and subject to the conditions of open fire policy No. 812, issued by said insurance companies. And thereupon, to wit, the day and year aforesaid, at Camden aforesaid, the said defendants, in consideration of the said sum of two hun-
dred & fifty dollars, ($250,) to them by the said plaintiff paid
14 as premium for the insurance of nine thousand five hundred dol-
lars on the said cotton, and five hundred dollars on the said gin-
house in said certificate mentioned, undertook and promised said plaintiff to insure him against loss or damage by fire, to the amount of nine thousand five hundred dollars ($9,500) on said cotton, and five hundred dollars ($500) on said gin-house in said certificate mentioned, under and subject to the conditions of open fire policy number 812, issued by said insurance companies, the defendants.

And the said plaintiff says that, at the time of making such insurance, and from then until the fire hereinafter mentioned, the plaintiff was the owner of said cotton and said gin-house in said certificate mentioned, and that the value of said cotton exceeded $9,500, and the value of said gin-house exceeded $500.

And the said plaintiff avers that the conditions in the said open fire policy 812, referred to in said certificate were and are in the words following, that is to say:

"*Open for endorsements.*

"No. 812. Underwriters' policy. $40,000.

"By this policy of insurance The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Com-
pany, and The Republic Fire Insurance Company, all of the city
15 of New York, each acting and contracting for itself, and not one
for the other or others, in consideration of one-fourth part of the

respective sums to be specified as premiums and endorsed hereon, do each insure W'm D. McDowall, of Camden, South Carolina, for account of the respective persons hereinafter referred to, as entitled to the benefit of this policy, against loss or damage by fire, to the amount of one-fourth part of the respective sums, which, within the limits hereinafter mentioned, shall be endorsed upon this policy, and specified in the column on the other side headed "Amounts insured," upon such produce & other merchandize, whether hazardous, not hazardous, or extra hazardous, situate or being in such storehouses or places at or in the immediate vicinity of Camden, S. C., and for such period of time not exceeding one year as shall also be specified by way of endorsement hereon in the appropriate columns for those purposes on the other side, and also specified in the certificates hereinafter mentioned. It being understood and agreed that no sum greater in the aggregate than forty thousand dollars shall be insured under this policy upon produce or merchandize which shall be in any one storehouse or place at the same period of time. And it being further understood that the insurance hereby made shall be for the benefit of the respective persons
16 whose names shall be written on the other side in the column
arranged for that purpose, and to whom a certificate, authenticated by the general agent of said insurance companies, specifying the names of such persons, the amount & period of such insurance, the premium therefor, the goods insured, and the place of their location, signed by said W'm D. McDowall, shall be issued and delivered by him simultaneously with the endorsement of the risk upon this policy, and at the time when he shall agree to permit such person to come in under this policy. And each of the said companies agrees to make good to the assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured by such company as aforesaid, as shall happen by fire to the property above specified during the period mentioned in such endorsements & certificates; the amount of such loss or damage to be estimated according to the actual cash value at the time of the loss, and to be paid sixty days after due notice and proofs of the same made by the assured, & received at the office of the general agency of the said companies in the city of New York, in accordance with the terms of this policy hereinafter mentioned; but, provided differences shall arise touching any loss or damage, after proof thereof has been made in due form, the matter shall, at the written request
17 of either party, be submitted to arbitrators indifferently chosen,
whose award, in writing, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liabilities of the companies respectively under this policy.

"Also, provided further, that it shall be optional with the companies to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within thirty days after receipt of proofs herein required; and in case the companies elect to rebuild, the assured shall, if required, furnish plan and specifications of the buildings destroyed.

"Neither of the companies shall be liable for loss by theft at or after the fire; nor for any loss or damage by fire caused by means of invasion, insurrection, riot, civil commotion, or military or usurped power; nor for the loss of bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, money, bullion, jewels, plate, watches, musical instruments, (except one piano or melodeon as part of the furniture of a dwelling-house;) nor for scientific instruments, ornaments, medals, patterns, printed music, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy; nor from fires in buildings unprovided with good and substantial stone or brick chimneys, nor 18 in consequence of any neglect or deviation from the law or regulations of police, where such exist; nor from loss or damage caused by the falling of any building, or from explosion or lightning; nor for loss or damage caused by removal of property from a building, unless it be proved that such removal was necessary to preserve the property, in which case the damage shall be borne by the assured and by the companies respectively in proportions that the sum insured by each bears to the whole value of the property insured. Plate glass in doors or windows, when the plates are of dimensions of three square feet or more, also store furniture & fixtures, must be separately & specifically insured, otherwise they are not protected by this policy.

"If any application, survey, plan, or description of the property herein insured is referred to in this policy, or in the endorsements hereon, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured of the condition, situation, or occupancy of the property; or any omission to make known every fact material to the risk; or an overvaluation or misrepresentation whatever, either in a written application or otherwise; or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the 19 companies written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever within the control of the assured, without the assent of the companies indorsed hereon; or if the property be sold or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance; or if this policy shall be assigned without the consent of the companies endorsed hereon; or if the premium shall be unpaid; or if the interest of the assured in the property, whether as owner, trustee, consignee, mortgagee, lessee, or otherwise, is not truly stated in their policy; or if the assured shall keep upon said premises gunpowder or phosphorus, or petroleum, or rock or earth oils, or benzole, benzine, or naptha, or any explosive substances, or shall keep or use upon said premises camphine, spirit gas, or chemical oils, without written permission on this policy, then, & in every such case, this policy shall be void: Provided, however, that without such written permission the assured may keep upon said premises for sale not exceeding twenty-five pounds of gunpowder, if the same be kept in close tin canisters, & be sold only by daylight, and that he may also keep for sale or use upon said premises not exceeding three barrels of petroleum or coal 20 oil. And if, in the opinion of the companies, an over-insurance exists, or shall hereafter be made, in the property hereby insured, or the risk be increased by any means, or if for any other cause the companies shall so elect, they respectively reserve to themselves the right of cancelling this policy, or any other insurance under the same, so far as they are respectively concerned, by paying to the assured the unexpired premium pro ratâ. Insurance once made may be continued for a further term, the premium therefor being paid, and a renewal receipt given for the same, and it shall be considered as continued under the original representation; but in case there shall be any change in the risk, either within itself or by adjacent buildings, not made known to the companies by the assured at the time of renewal, this policy and renewal shall be void. If the interest of the assured in the property be any other than the entire, unconditional, & sole ownership of the property for the use and benefit of the assured, it must be so represented to the companies, and so expressed in the written part of this policy; otherwise the policy shall be void.

"In case of any other insurance on the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of the companies respectively no greater proportion
21 of the loss sustained than the sum hereby insured by
each of them bears to the whole amount insured thereon, whether such other insurance be by specific or by general or floating policies.

"In case of loss, the assured shall use their best endeavour in saving & protecting the property from damage at and after the fire. If they shall fail to do so, the companies will not be liable for damage caused by such failure, and there can be no abandonment to the companies of the property insured. The assured shall forthwith give notice of said loss to the companies through their general agent in the city of New York, and, as soon after as possible, render a particular account of such loss, signed & sworn to by them, stating whether any and what other insurance has been made on the same property; giving copies of the written portion of all policies thereon; the actual cash value of the property; their interest therein; for what purpose and by whom the building insured or containing the property insured, and the several parts thereof, were used; when and how the fire originated; and shall also produce a certificate, under the hand & seal of a magistrate, notary public, or commissioner of deeds, (nearest to the place of fire, not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows
the character & circumstances of the assured, and verily
22 believes that the assured has without fraud sustained the loss
on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify. And the assured shall, if required, submit to an examination under oath by any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe to such examinations when reduced to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged; and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the companies. Damage to property not totally destroyed shall be appraised by disinterested men mutually chosen by the assured and the companies; and the companies reserve the right to take the articles at their appraised value. When personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers in writing shall form part of the proofs hereby
required, one-half of the appraisers' fees to be paid by the companies.
23 In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire &
sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified to by them. If this policy is made payable in case of loss to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured;

and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claims under this policy.

"Reinsurance, if hereby made for any other insurance company, to be on the basis of such a liability that, in the event of loss, these companies are each to pay only their respective portion of said loss pro ratâ with said other company as the amount reinsured bears to the whole amount insured by such other company.

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against either of these companies for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any
24 suit or action be commenced after the expiration of the said twelve months, the lapse of time shall be taken & deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

"It is further understood and agreed by and between the parties hereto that nothing herein contained shall be construed as creating or importing any joint liability on the part of the above-named companies, or either of them, but that each of said companies shall be regarded as only severally liable upon this policy for the amount insured by each under the same, in the same manner, and not otherwise, as if each had issued its separate policy for the proportionate amount which each insures as above mentioned; and if any additional amount shall be indorsed upon this policy, it is to be with the understanding that the said companies each become insurers only for the fourth of such additional amount.

"It is further understood that the taker or holder of this policy shall not, nor shall any person insured under the same, participate in the profits of either of the said companies.

"This policy is made and accepted upon the above express conditions, which are to apply to all insurances made under the same.

"In witness whereof the said companies have respectively
25 caused these presents to be signed by their respective presidents, & attested by their respective secretaries in the city of New York the thirtieth day of June, A. D. one thousand eight hundred & sixty-five.

[SEAL.]
"M. HILYER, *President*,
"JNO. EDW'D KAHL, *Secretary*,
"*Of the Germania Fire Ins. Co.*
"DORAS L. STONE, *President*,
"B. S. WALCOTT, *Secretary*,
"*Of the Hanover Fire Ins. Co.*
"JONATHAN D. STEELE, *President*,
"P. NOTMAN, *Secretary*,
"*Of the Niagara Fire Ins. Co.*
"ROB'T S. HOWE, *President*,
"D. F. CURRY, *Secretary*,
"*Of the Republic Fire Ins. Co.*"

[Stamp.]

26 And the said plaintiff says that afterwards, to wit, on the 27th day of December, 1866, the said seed cotton and gin-house in Kershaw District were wholly consumed and destroyed by fire, and wholly lost to the plaintiff.

And the said plaintiff avers that forthwith after the said loss, to wit, on the day of 186 , he gave notice thereof to the said defendants, and as soon thereafter as possible, to wit, on the 14th day of January, 1867, did render to said defendants a particular account of such loss and damage, signed & sworn to by him, stating the actual cash value of the property as nearly as could then be ascertained; the interest of plaintiff therein; for what purpose and by whom the building insured & the several parts thereof were used; when and how the fire originated; and did also produce a certificate, under the hand & seal of J. K. Witherspoon, the magistrate nearest to the place of fire, (not concerned in the loss as creditor or otherwise, nor related to the assured,) stating that he had examined the circumstances attending the fire; that he knew the character & circumstances of the assured, and did verily believe that the assured has, by misfortune and without fraud or evil practice, sustained loss and damage on the properties insured to the amount of eight thousand nine hundred dollars, ($8,900.)

27 And the said plaintiff further avers that, although he has in all things observed, performed, & fulfilled all & singular the matters and things which on his part were to be observed, performed, & fulfilled, according to the form & effect of said policy of insurance; and altho' he has sustained loss & damage on occasion of said fire to a large amount, to wit, to the amount of ten thousand dollars & upwards as aforesaid, yet the said defendants have not paid to the said plaintiff the said sum of money so by the said defendant insured as aforesaid, or repaid or reimbursed the said loss sustained by the fire aforesaid, altho' often requested, or any part thereof, but the sum so insured, and the said loss and every part thereof, still remains wholly in arrear and unpaid, contrary to the form and effect of the said policy of insurance so by said defendants in that behalf made as aforesaid.

2. And that whereas said defendants, on the 21st day of November, 1866, at Camden, in the State of So. Carolina, made & delivered to plaintiff a certain certificate of insurance, whereby and wherein the said defendants, in consideration of the sum of two hundred & fifty dollars, ($250,) then paid by the plaintiff to the defendants, and by them received as premium for such insurance, at the rate of 2½ per cent., did each insure the said plaintiff against loss or damage by fire to the amount 28 of one-fourth part of the sum of ten thousand dollars, viz, nine thousand five hundred dollars ($9,500) on one hundred and five thousand (105,000) pounds of seed cotton, also ($500) five hundred dollars on the gin-house containing the said cotton, in Kershaw District, So. Ca., for the period of three months from the delivery of said certificate, that is to say, from the twenty-first day of November, 1866, at noon, to the twenty-first day of February, 1867, at noon, under & subject to the conditions of open fire policy number 812, issued by said insurance companies. And thereupon, to wit, the day & year aforesaid, at Camden aforesaid, the said defendants, in consideration of the sum of two hundred and fifty dollars ($250) to them by said plaintiff paid as premium for the insurance of nine thousand five hundred (9,500) dollars on the said cotton, and five hundred (500) dollars on the said gin-house in said certificate mentioned, undertook and promised to said plaintiff to insure him against loss or damage by fire to the amount of nine thousand five (9,500) dollars on said cotton, and five hundred dollars on said gin-house in said certificate mentioned, under & subject to the conditions of open fire policy number 812, issued by said insurance companies, the defendants.

And the said plaintiff says that, at the time of making such in-

29 surance, and from then until the fire hereinafter mentioned, the plaintiff was the owner of said cotton and said gin-house in said certificate mentioned, and that the value of said cotton exceeded $9,500, and the value of said gin-house exceeded $500.

And he, the said plaintiff, avers that the conditions in the open fire policy 812, referred to in said certificate, were and are hereinbefore set forth in the foregoing count. And the said plaintiff says that afterwards, to wit, on the 27th of December, 1866, the said cotton and gin-house were wholly consumed and destroyed by fire, and wholly lost to plaintiff; of all which the said defendants then had due notice. And the said plaintiff avers that afterwards, to wit, the 14th day of Jan'y, 1867, he did well & substantially perform all the conditions, matters, & things by him to be performed, done, and observed by said open fire policy number 812, and that the same was then & there accepted by said defendants as full & sufficient performance of the conditions by said plaintiff to be performed; nevertheless, the said defendants, not regarding their promises aforesaid made, have not paid to the said plaintiff the said sum of money so by the defendants insured as aforesaid, and have not indemnified the said plaintiff for the loss sustained by said fire, or for any part thereof, but to pay the same have refused, and
30 still do refuse, to the damage of the plaintiff ($20,000) twenty thousand dollars; and therefore he brings suit.

(Signed) PORTER & CONNER,
Pl'ff's Att'ys.

Plea.

And on the 20th day of December, 1869, come into court The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, by Simonton & Barker, their attorneys, and moved the court for leave to withdraw the pleas to the old declaration, and to plead de novo, which was granted, as follows:

On motion of Simonton & Barker, attorneys for defendants, it is ordered that defendants have leave to withdraw the pleas originally filed to the old declaration in this cause, previous to the order for a new trial, and to demur or plead, as they may be advised, de novo.

(Signed) GEO. S. BRYAN,
U. S. Judge Dist So. Ca.

And thereupon said defendants by their attorneys file their plea in words and of the tenor following:

Plea in abatement.

And the said defendants come and defend the wrong & injury when, &c., and pray judgment of said , because they say that said plaintiff is not, and hath not at any time been, since his action
31 brought, a person compos mentis, capable of suing or being sued, but was at the time of his action brought, and hath since ever been, in the hands of a committee, to wit, William F. Boykin, duly appointed according to law, and that said committee is a necessary party to this suit; and this they are ready to verify. Wherefore they pray judgment of the writ aforesaid, and that the same be quashed.

(Signed) SIMONTON & BARKER,
Def'ts' Att'ys.

Gen. demurrer.

And the said plaintiff saith that the said plea of defendants, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to quash the said writ, and that said plaintiff is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of sufficient plea in this behalf, the said plaintiff prays judgment, and that said defendants may answer further to the said declaration.

(Signed) PORTER & CONNER,
Pl'ff's Att'ys.

And the said defendants say that the said plea, and the matters therein contained in manner & form as stated, are sufficient in law to quash the writ.

(Signed) SIMONTON & BARKER,
Def'ts' Att'ys.

32 *Judgment on demurrer.*

Afterwards, on the twentieth day of December, A. D. 1869, come here as well the said Burwell E. Boykin as the said The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, by their respective attorneys aforesaid. Whereupon all and singular the premises being seen, and by the court here fully understood, and mature deliberation being thereupon had, it appears to the said court here that the said plea of the said defendants by them above pleaded and the matters therein contained are not in law sufficient to quash the said writ of said Burwell E. Boykin; therefore it is considered that the said defendants do answer further to said writ & declaration of the said Burwell E. Boykin.

(Signed) GEO. S. BRYAN,
U. S. Judge So. Ca. Dist.

And thereupon, no further day being given to the parties aforesaid for the said defendants to plead to the said declaration, but they being called on instantly to answer the same on the same 20th day of December aforesaid:

And as to the first second, third, and fourth counts in the said declaration, filed previous to amendment thereof by the plaintiff, 33 these defendants, by their atterneys, come & defend the wrong & injury when, &c., and say that said declaration, & the matters therein contained, in manner & form as the same are above stated & set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action against the said defendants, and they, the said defendants, are not bound in law to answer the same. Wherefore, by reason of the insufficiency of said declaration in this behalf, the said defendants pray judgment, and that the plaintiff may be barred from having his action aforesaid against them.

And the said defendants state and show to the court the following causes of demurrer to the said declaration, that is to say:

That the first count alleges that, in consideration of the payment of the said sum of two hundred and fifty dollars by the said plaintiff to said defendants as a premium or reward for the insurance of nine thou-

sand dollars on the said cotton, and of five hundred dollars on the said gin-house in said certificate mentioned, the said defendants undertook & promised the plaintiff to become insurers to said plaintiff. Whereas it appears by said declaration that the said defendants undertook and promised to become insurers to said plaintiff, under
& subject to the conditions of open fire policy No. 812, issued by
34 the said insurance companies.

2. And that the conditions of open fire policy No. 812, referred to in the certificate, as they appear by the additional counts of the amended declaration, require the performance by the plaintiff of several distinct conditions set forth in said policy as precedent to the plaintiff's right of action, and should have been set forth in said declaration.

3. And that the performance by the plaintiff of all of said conditions of his contract hath not been alleged in said first, second, third, and fourth counts of said declaration.

4. That the first count in the said declaration contains averments which are inconsistent and contradictory, in this, that the said count avers that the defendants caused to be made a certain certificate of insurance; purporting thereby, and containing therein, that the defendants, for the consideration named, did insure under and subject to the conditions of open fire policy number 812, issued by the said defendants; and the said count afterwards, & in distinct contradiction thereof, avers that no open fire policy No. 812, nor any other fire policy whatever, was mentioned to said plaintiff, nor were the contents and condi-
tions of such open fire policy then or at any time made known
35 to the said plaintiff by the companies, or by the said W. D.
McDowall, agent, or any other person or persons on behalf of said companies. And the said count further avers that said defendants undertook and promised the plaintiff to become insurers to said plainttiff of the said sum of ten thousand dollars on the said cotton and gin-house, in manner & form aforesaid. And the said count likewise avers that the said defendants became insurers to the plaintiff, and then & there, by the said McDowall, agent, and the said A. Stoddart, general agent, in that behalf duly subscribed and countersigned the said policy of insurance as such insurers, "in manner aforesaid;" which said words, "in manner aforesaid," palpably refer to the conditions of open policy No. 812, issued by said defendants, under and subject to which (as the plaintiff in said count first alleges) the defendants did insure, and yet in contradiction thereof said plaintiff afterwards avers that said open fire policy No. 812 was not mentioned to him, the said plaintiff, nor were the contents & conditions of such open fire policy then or at any time made known to him.

5. And also for that in the said count no averment is made, as should have been made, of the conditions of open fire policy No. 812, under & subject to which, as the plaintiff himself alleges, the said defendants
undertook and promised to become, & did become, insurers.

36 6. Nor is any averment therein contained (as should have
been, in order to entitle said plaintiff to his action) of the performance by the said plaintiff of all or any of the conditions of said fire policy, the performance of which by the said plaintiff may, for ought which appears from the said count, have constituted, and which, by the terms of said policy in said declaration set forth, did constitute part of the consideration for the undertaking and promise of the defendants, and conditions precedent to the right of said plaintiff to his action.

7. And for that the said count alleges that no open fire policy No. 812, nor any other fire policy whatever, was delivered or exhibited or mentioned to said plaintiff; nor were the contents & conditions of any such open fire policy then or at any time made known to the said plaintiff by the companies, or by the said W. D. McDowall, agent, or by any other person in behalf of said companies; but the said count nowhere avers, as it should have done, that any request was made by said plaintiff that said open fire policy should be delivered or exhibited to him, or that the contents and conditions should be made known to him, either by the said W. D. McDowall, agent, or by the said companies or any other person. Nor does said count aver, as it should have done,
that the said company, or the said W. D. McDowall, agent,
37 or any other person in their behalf, after being requested,
refused to deliver or exhibit said policy to the said plaintiff, or
to make known to him the contents & conditions thereof. Nor doth said count, as it should have done, aver that it was the duty of said companies, or of said W. D. McDowall, as their agent, without request, to have so delivered or exhibited said policy to the said plaintiff, or to make known the contents & conditions thereof beyond the notice thereof, and reference thereto, in said certificate contained. Nor doth the said count aver that, it being such their or his duty, they or he failed to perform the same.

And the said count is further insufficient in law in that it doth not set forth the actual value of the said cotton, nor the actual value of the said gin-house therein alleged to have been burned; nor that the defendants had notice of such value; and also that said count of said declaration is in other respects uncertain, repugnant, informal, and insufficient in law.

(Signed) SIMONTON & BARKER,
Def'ts' Att'ys.

Demurrer to additional counts.

5. And the said defendants, by their attorneys, come and de-
38 fend the wrong & injury when, &c., and say that the said dec-
laration, & the matters therein contained in manner & form as the same are above stated & set forth, are not sufficient in law for the said plaintiff to have or maintain his action aforesaid against the said defendants, and they, the said defendants, are not bound in law to answer the same; wherefore, by reason of the insufficiency of said declaration in this behalf, the said defendants pray judgment, and that the plaintiff may be barred from having his action aforesaid thereof against them.

And the said defendants state and shew to the court the following cause of demurrer to the said declaration, that is to say:

That the same does not set forth the particular account required by the policy as set forth in said declaration, especially in this, that it doth not set forth the actual value of the property destroyed by fire, as alleged in said alleged particular account to have been stated.

For that the 5th count of said declaration (being the first of the additional counts) doth state that the plaintiff, on the 14th day of January, did render the defendants a particular account of such loss and damage signed & sworn to by him, stating the actual cash value as nearly as could be then ascertained; whereas the condition of the policy, the
performance of which is precedent to the right of action for loss
39 under same, is that the assured shall state the actual value of
the property.

For that the said 5th and 6th counts in the said declaration, being the 1st & 2d counts of the additional counts, are repugnant, in this, that the said first count doth aver that the actual value of said property was stated by plaintiff on the 14th day of January, 1867, as nearly as could then be ascertained. Whereas the said second count avers that the plaintiff did well & substantially perform all the conditions, matters, & things by him to be performed, done, and observed on said 14th day of January.

For that the said 6th count, being 2d of additional counts, doth not aver the performance of all of the conditions of the policy, which by the same are made conditions precedent to the plaintiff's right of action in the premises, stating the same in manner & form as required by law, but doth aver only that the plaintiff did, on the 14th day of January, 1867, well & substantially perform all the conditions, matters, & things by him to be performed, done, & observed by the policy.

For that the said 6th count, being the 2d of additional counts, of said declaration avers that afterwards, to wit, on the 14th January, 1867, the plaintiff did well and substantially perform all the conditions, &c. Whereas the condition of the policy as set forth in said count was, that said plaintiff should, as soon as possible thereafter, to wit,
40 after the 27th of December, 1866, render a particular account,
&c.; and it doth not appear by said count that the said 14th of January, 1867, was as soon as possible thereafter.

And also that the said declaration is in other respects uncertain, informal, & insufficient, &c.

(Signed) SIMONTON & BARKER,
Def'ts' Att'ys.

Joinder in demurrer.

And the said plaintiff saith that the said declaration, & the matters therein contained, in manner & form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendants.

PORTER & CONNER,
Pl'ff's Att'ys.

Judgment on demurrer.

Afterwards, on the 21st day of December, A. D. 1869, come here as well the said Burwell E. Boykin as the said The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, by their respective attorneys aforesaid; whereupon all & singular the premises, whereof the said parties have put themselves upon the judgment of the court, being seen, and by the court here fully understood, and mature deliberation being thereupon had, it appears to the
41 court here that the said first, second, third, and fourth counts of
the declaration, (previous to the amendment thereof by the plaintiff,) and the matters therein contained, in manner & form as the same are above stated & set forth, are not sufficient in law; therefore it is considered that the said plaintiff take nothing by his said writ, but that he be in mercy, and so forth.

And it further appears to the court here that the said fifth and sixth counts of declaration, being the additional counts of same as amended, are sufficient in law; therefore it is considered that the said defendants do answer further to the said writ and declaration of the said Burwell E. Boykin.

Judgment signed 21 December, 1869.

Pleas.

And the said defendants thereupon, by their attorneys, file their pleas to the declaration in words and of the tenor as follows:

And the said defendants, by Simonton & Barker, their attorneys, come and defend the wrong and injury when, &c., and say that they did not undertake or promise in manner & form as the said plaintiff hath above thereof complained against the said defendants; and of this the said defendants put themselves upon the country, &c.

SIMONTON & BARKER,
Def'ts' Att'ys.

And the said plaintiff doth the like.

PORTER & CONNER & DE PASS,
Pl'ff's Att'ys.

42 *Special pleas.*

And the said defendants come and defend the wrong and injury when, &c., and say that the said plaintiff ought not to have or maintain his action aforesaid thereof against them, because they say it is provided in the conditions of insurance under the certificate named in the declaration, and the same appears in the condition set forth in said declaration as follows, to wit:

"In case of loss the assured shall use their best endeavors in saving & protecting the property from damage at and after the fire. If they shall fail to do so, the companies will not be liable for damage caused by such failure, and there can be no abandonment to the companies of the property insured. The assured shall forthwith give notice of said loss to the companies through their general agent in the city of New York, and as soon after as possible render a particular account of such loss, signed & sworn to by them, stating whether any and what other insurance has been made on the said property, giving copies of the written portion of all policies thereon, the actual cash value of the property, their interest therein, for what purpose, and by whom the building insured or containing the property insured, and the several parts thereof, were used, when and how the fire originated; and
43 shall also produce a certificate, under the hand and seal of a
magistrate, notary public, or commissioner of deeds, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and the assured shall, if required, submit to an examination under oath by any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe such examinations when reduced to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether

damaged or not damaged, and shall also produce certified copies of all bills & invoices, the originals of which have been lost, and exhibit the same for examination to any persons named by the companies. Damage to the property not totally destroyed shall be appraised by disinterested men mutually chosen by the assured and the companies. And the companies reserve the right to take the articles damaged at their appraised value. When personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly
44 arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers in writing shall form a part of the proofs hereby required, one-half of the appraisers' fees to be paid by the companies. In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified to by them. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured; and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempts at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy."

And the defendants further say that, after the loss in the declaration stated, the plaintiff was required and did, on the 9th of January, 1867, submit to an examination on oath by a person appointed by the companies, to wit, by one O. E. Hosmer, being duly sworn by one
45 J. K. Witherspoon, a magistrate duly qualified, and the said examination was reduced to writing by said Witherspoon, and the plaintiff did subscribe the same when reduced to writing, as follows, to wit:

"STATE OF SOUTH CAROLINA,
"*Kershaw District:*

"Personally appeared B. E. Boykin before me, J. K. Witherspoon, a magistrate in and for the State and district, who on oath says that he is a planter of this district, residing about twelve miles from Camden. He owns & occupies said plantation, consisting of about four hundred & thirty acres of land, and that the past year he cultivated two hundred and fifty acres thereof in cotton; that, during the picking season, he stored his cotton in his new gin-house, just erected on the premises, daily, as picked, and the same was regularly weighed in, with the exception of the last two weeks' picking, which was not weighed. On the 21st November, 1866, he took out insurance on the cotton stored in said gin-house, in the underwriters' agency of the city of New York, for the sum of nine thousand five hundred (9,500) dollars, and five hundred on the new gin-house just erected, for the term of three months from said 21st Nov'r; that on Thursday night, Dec'r 27th, 1866, at about 9 o'cl'k p. m., a fire was discovered issuing from the gin-house, which
46 totally consumed said gin-house and all the cotton contained therein. The said fire was undoubtedly the work of an incendiary; that he has good reason to believe, and does believe, that said house was set on fire by one or two freedmen heretofore employed by him; that, about the 1st of October last, he discharged from his employment one

freedman by name of Jack for stealing, convicted and fined for said offense, and his wages retained to pay fine, and himself discharged; that soon thereafter this deponent heard of threats being made by said negro to burn his premises, and that he should not sell his cotton. This, the deponent heard at various times and from several sources, particularly from the freedmen on his place; that, in consequence of said threats, he felt it his duty to insure his premises and cotton, and keep a strict watch of the doings of this negro; that, at the time of the fire, this deponent was absent, having gone to the city of Charleston. From what he has heard since his return, his suspicions of this negro having burned said gin-house and contents are fully confirmed.

(Signed) "B. E. BOYKIN.

"Sworn to before me this 9th January, 1867.

"J. K. WITHERSPOON, *Magistrate*."

[5 c. stamp]

47 And the same is binding upon said plaintiff as one of the proofs preliminary to his right of action on his said certificate of insurance, and accepted by the defendants as such.

And the defendants further say that the matter in said examination on oath so as above stated and contained were not, at any time prior to the making of said certificate of insurance, nor at the time of making the same, nor at any time thereafter before the happening of the loss by fire in the declaration mentioned, made known to the defendants, nor were the same known to them at any time before the said loss by fire; and this they are ready to verify.

Wherefore they pray judgment, if the said plaintiff ought to have or maintain his action aforesaid thereof against them, &c.

And for further plea in this behalf, the defendants say that the plaintiff ought not to have or maintain his action aforesaid against them, because they say that, after the loss by fire in the declaration mentioned, to wit, on the 9th day of Jan'y, 1867, the plaintiff did admit and state to one O. E. Hosmer, an officer of the companies, in the town of Camden, State of So. Carolina, as above set forth in the last plea.

(AFFIDAVIT.—We consent that the affidavit quoted in first plea be recited here, as if the same were repeated in this plea.—(Signed) PORTER & CONNER.)

48 And the defendants further aver that the matters so admitted and stated were not made known by the plaintiff before or at the time of the making of the certificate of insurance in the declaration mentioned, nor at any time thereafter before the loss by fire in the declaration mentioned, nor were the same known to said defendants; and this they are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his action aforesaid against them, &c.

13. And for further plea in this behalf the said defendants say that said plaintiff ought not to have or maintain his action aforesaid against them, because they say that, at the time of effecting the contract of insurance under the certificate mentioned in the plaintiff's declaration, the plaintiff knew or believed that a threat or threats to burn the property referred to in said certificate had been made by evil-disposed persons, and particularly by one Jack, a freedman, which said threat or threats the said plaintiff wholly concealed from the said defendants, and said threat or threats was or were utterly unknown to the defendants, whereby the said contract of insurance became void and of no effect; and this the

defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his action aforesaid against them, &c.

14. And for further plea in this behalf the said defendants say
49 that the plaintiff ought not to have or maintain his action aforesaid against them, because they say that, at the time of effecting the contract of insurance under the certificate mentioned in plaintiff's declaration, the plaintiff knew or believed that a threat or threats to burn the property referred to in said certificate had been made by evil-disposed persons, and particularly by one Jack, a freedman, which said threat or threats was or were utterly unknown to the defendants, whereby the said contract of insurance became void and of no effect; and the said defendants further say that they, the said defendants, would not have made such certificate, if such threats had been made known; and this these defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his action aforesaid against them, &c.

15. And for a further plea in this behalf the said defendants say that the said plaintiff ought not to have or maintain his action aforesaid against them, because they say that said plaintiff, before and at the time of making said certificate of insurance as in the declaration alleged, had heard of threats against him, the said plaintiff, which induced him, the plaintiff, to great apprehension that one Jack, or some other evil-disposed person, would burn, or cause to be burned, the property
50 named in said certificate of insurance. Yet the said plaintiff did not at that time, nor at any other time, before the happening of loss by fire to said property, disclose to said defendants the threats and great apprehension, nor were the same known to the defendants or their agent, wherefore said certificate of insurance became void; and this the defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them, &c.

16. And for further plea in this behalf the defendants say that said plaintiff ought not to have or maintain his action aforesaid against them, because they say that, after the certificate of insurance in the declaration mentioned was made as mentioned in said declaration, to wit, on the   day of November, 1866, the plaintiff excited, or believed that he had excited, the enmity of one Jack, a freedman, a person of notoriously bad character, and was in great apprehension of burning by said Jack in consequence thereof, which said hostility and apprehension the plaintiff wholly failed to disclose, and never did disclose, to the defendants, nor was the same ever known to the defendants before the loss of fire in the declaration mentioned, whereby the said contract of insurance became void and of no effect; and this the defendants are ready to verify. Wherefore they pray judgment if the said
51 plaintiff ought to have or maintain his aforesaid action against them.

17. And for further plea in this behalf the said defendants say that the said plaintiff ought not to have or maintain his action aforesaid against them, because they say that, at the time of making the said certificate of insurance in the declaration mentioned, to wit, on the   day of   , the plaintiff knew or believed that he had excited the enmity of one Jack, a freedman, in consequence of which said plaintiff had great apprehension that said Jack would burn, or cause to be burned, the said property, which said knowledge or belief and great apprehension the plaintiff did not before, or at the time of making said

insurance, nor at any time thereafter, make known to the defendants, nor was the same known to them at any time prior to the happening of the loss by fire as alleged in the declaration; and this they are ready to verify. Wherefore defendants pray judgment if said plaintiff ought to have or maintain his action aforesaid against them.

18. And for further plea in this behalf the said defendants say that plaintiff ought not to have or maintain his action aforesaid against them, because they say that, before and at the time of the insurance under said certificate, as alleged in the declaration, and at all times
thereafter, up to the period of the loss by fire as in said declaration
52 stated, plaintiff had reason to believe or did believe that
one Jack, a freedman, of notorious bad character, or some other evil-disposed person, designed to burn the property named in said certificate; yet the said plaintiff did not, before or at the time of making of said certificate, nor at any time thereafter, disclose the said belief, nor was the same at any time known to the defendants; and this they are ready to verify. Wherefore they pray judgment if plaintiff ought to have or maintain his aforesaid action against them &c.

19. And for a further plea in this behalf the defendants say that said plaintiff ought not to have or maintain his aforesaid action against them, because they say it was an implied condition of the said insurance in said declaration mentioned, and the plaintiff did promise and bind himself thereto, at the time of making said insurance, that the property insured should have intelligent care and custody during the term of said insurance; and defendants aver that, after making said insurance and before the loss of fire, to wit, on the day of , 1866, the plaintiff became and was a person non compos, and so remained until after the time of said loss of fire, notwithstanding which
the said property was in his sole care and custody, and under
53 his control, whereby the said insurance became void; and this
defendants are ready to verify. Wherefore they pray judgment if plaintiff ought to have or maintain his action, &c., against them, &c.

20. And for a further plea in this behalf the defendants say that the plaintiff ought not to have or maintain his aforesaid action against them, because they say that it is provided in the conditions of insurance under the certificate named in the declaration, and the same appears in the condition set forth in said declaration as follows, to wit: "In case of loss the assured shall use their best endeavors in saving and protecting the property from damage at and after the fire; if they shall fail to do so, the companies will not be liable for damage caused by such failure, and there can be no abandonment to the companies of the property insured. The assured shall forthwith give notice of said loss to the companies thro' their general agent in the city of New York, and as soon after as possible render a particular account of such loss, signed & sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon, the actual cash value of the property, their
interest therein, for what purpose and by whom the building insured,
54 or containing the property insured, and the several parts
thereof, were used, when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, not related to the assured,) stating that he has examined the circumstances attending this loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the prop-

erty insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and the assured shall, if required, submit to an examination on oath by any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the companies; damage to property not wholly destroyed shall be appraised by disinterested men, mutually chosen by the assured and the companies, and the companies reserve the
55 right to take the articles at their appraised value. When personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers, in writing, shall form a part of the proofs hereby required; one-half of the appraisers' fees to be paid by the companies. In case of loss on property held in trust or commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified to by them.

If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured; and until such proofs, declarations, and certificates are produced, and examinations and appraisals are permitted, the loss shall not be payable. All fraud, or attempts at fraud, or false swearing, on the part of the assured shall cause a forfeiture of all claims under this policy.

And the defendants, &c.

56 And the defendants further say that, after the plaintiff had duly submitted to an examination on oath by one O. E. Hosmer, a person named by the companies, and the same was reduced to writing and signed by the plaintiff, to wit, on the 9th Jan'y, 1867, the plaintiff refused to submit to a second examination on oath by one O. E. Hosmer, a person appointed by the companies, though deemed necessary by the companies, and would not submit to the same, nor hath ever since agreed to submit to the same, though often requested; and this the defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them, &c.

21. And for a further plea in this behalf the defendants say that the plaintiff ought not to have or maintain his action aforesaid against them, because they say that the certificate of insurance in the declaration mentioned was subject to the following conditions, to wit, &c.:

"In case of loss," &c., &c. * * * * * *

(We waive here the recital of the policy.—PORTER & CONNER.)

And defendants aver that said plaintiff hath not performed the said conditions so as aforesaid set forth, but hath wholly failed so to do, though often requested; and this they are ready to verify.

Wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action against them.

57 And the plaintiff, by his attorney, moved to strike out the special pleas under 56th rule of court; which motion was granted, as follows:

Order.

On motion of Porter & Conner, attorneys for plaintiff, ordered that the special pleas filed by defendants to the declaration be stricken out, as in the judgment of the court they contain only matters which may be given in evidence under the general issue.

GEO. S. BRYAN,
Judge U. S. for S. C. D.

Bill of exceptions.

Before the jurors withdrew from the bar of the court here, the said defendants, The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, by their attorneys aforesaid, tendered to the court here the following bill of exceptions, which was by the court here signed and sealed, and which is in form following, viz:

Defendants' bill of exceptions.

In the circuit court of the United States for the district of South Carolina.

BARWELL E. BOYKIN, OF SOUTH CAROLINA,
vs.
THE GERMANIA FIRE INSURANCE COMPANY, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, of New York.
} November term, 1869.

58 On the trial of the cause, the plaintiff, to maintain and prove the issue on his part, gave in evidence the following testimony:

W. D. MCDOWELL, sworn, testified that he (W. D. McDowell) was the agent of the Underwriters' Agency, consisting of The Germania, Niagara, Hanover, & Republic Fire Insurance Companies; that he issued a certificate of insurance to Burwell E. Boykin, dated the 21st November, 1866, for the period of three months, the premium whereon was paid; that the policy of insurance issued by witness was similar to the one produced in court & shown to witness; the certificate shown from the declaration was indorsed in the book according to the rules of the company; that O. E. Hosmer is one of the assistant agents of the Underwriters' Agency; that he was in Camden early in January for about a week; that McDowell received the following letter from the agent of the company:

"UNDERWRITERS' AGENCY,
("Composed of The Germania, Niagara, The Hanover, & Republic Fire Insurance Companies of New York,)
"175 *Broadway, Jan'y 21st*, 1867.

"W. D. MCDOWELL, Esq., *Agent, Camden, So. Ca.*

"DEAR SIR: Your favour of 15th inst. is at hand, with papers
59 in case of B. E. Boykin, which have had our attention. Under

the very remarkable circumstances revealed by Mr. B.'s affidavit, there can be no possible claim under his policy. There can certainly be no equitable claim, and the rule in law is that any concealment of facts material to the risk render the policy void.

"Please inform Mr. Boykin that we cannot entertain his claim, and advise us.

"Yours, truly,

"A. STODDART, *G. A.*"

Upon his cross-examination witness said that he (McDowell) informed Mr. De Pass of the letter received from Stoddart. De Pass was the agent or attorney of Mr. Boykin; that, at the time witness insured Boykin, he (Boykin) did not disclose to witness any particular fact which would have influenced the mind of witness in reference to the insurance; that Boykin did not disclose to McDowell that threats had been made by any person or persons against his property, or make known to witness his apprehension in regard to any particular person; that witness was not, at any time after he effected this insurance, and until the 27th of December, when the loss is stated to have occurred, informed of any
change in the condition of Boykin's mind or health; that, after
60 effecting the insurance, and between that time and the time of
the alleged loss by fire, witness was not informed by Boykin or
any one else of any threats made against him or his property, or of any apprehension existing on the part of any person of injury to him or his property; that witness was not authorized by his companies to insure any party against whom threats had been made; and witness would not have taken the risk had he been advised of any threats having been made; that witness had a discretion reposed in him in the taking of risks, and exercised that discretion in this case.

3. And the defendants, to maintain the issue, gave in evidence the contents of an open fire policy, which W. D. McDowell proved to be the same as open fire policy No. 812. W. D. McDowell testified that the certificate declared on was issued under and subject to the conditions of open fire policy No. 812; that O. E. Hosmer, the agent of the insurance companies, was in Camden, S. C., about the 7th or 9th January, 1867; that Boykin was in the office of witness while Mr. Hosmer was there; that Boykin came up to make his affidavit to adjust his loss; that he came into the office and said he wanted to make proof of loss; that he came up to make proof before some magistrate; that
(witness thinks) Kennedy sent for him; that it is more than likely
61 that witness told Kennedy to send for Boykin, because witness
knew that Mr. Hosmer was there, and was anxious to get him;
Mr. Hosmer wanted Boykin to come in and arrange the proofs as soon as possible; that he (McDowell) introduced Boykin to Hosmer, and he and Hosmer went into Mr. Witherspoon's office, the door above, to make the affidavit; Boykin had a book with him that had the weights of his cotton in; that Boykin went with Hosmer to the nearest magistrate to make his proofs; that witness (McDowell) was shown the following affidavit, which he testified to be in the handwriting of Witherspoon, and signed by Boykin and by Witherspoon:

Affidavit, marked Exhibit A, on part of defendants.

"STATE OF SOUTH CAROLINA, *Kershaw District:*

"Personally appeared B. E. Boykin before me, J. K. Witherspoon, a magistrate in and for the State and district, who on oath says that he is a planter of this district, residing about twelve miles from Camden; he owns & occupies said plantation, consisting of about four hundred and thirty acres of land, and that the last year he cultivated two hundred and fifty acres thereof in cotton; that during the picking season he stored his cotton in his new gin-house, just 62 erected on the premises, daily as picked, and the same was regularly weighed in, with the exception of the last two weeks' picking, which was not weighed. On the 21st day of November, 1866, he took out insurance on the cotton stored in said gin-house in the Underwriters' Agency of the city of New York, for the sum of nine thousand five hundred, ($9,500,) and five hundred dollars on the new gin-house just erected, for the term of three months from the said 21st of November; that on Thursday night, Dec'r 27th, 1866, at about 9 o'cl'k p. m., a fire was discovered issuing from the gin-house, which totally consumed said gin-house, and all the cotton contained therein; the said fire was undoubtedly the work of an incendiary; that he has good reason to believe that said house was set on fire by one or two freedmen heretobefore employed by him; that on or about the first of October last, he discharged from his employment one freedman by the name of Jack, for stealing—convicted & fined for said offence, and his wages retained to pay said fine, and himself discharged; that soon thereafter this deponent heard of threats being made by said negro to burn his premises, and that he should not sell his cotton; this the deponent heard at various times, and from several sources, particularly from the freedmen on his place; that, in consequence of said threats, he 63 felt it his duty to insure his premises and cotton, and keep a strict watch of the doings of this negro; that at the time of the fire this deponent was absent, having gone to the city of Charleston. From what he has heard since his return, his suspicions of this negro having burned his gin-house and contents are fully confirmed.

(Signed) "B. E. BOYKIN.

"Sworn to before me this 9th of Jan'y, 1867.

"J. K. WITHERSPOON, *Magistrate.*"

That Hosmer left Camden after the affidavit was taken; that after Hosmer left Camden, McDowell received proofs from Boykin and forwarded them; that it must have been on the 15th.

McDowell being shown the following papers, recognizes them as the papers received from Boykin:

Proofs of loss, marked Exhibit B, on the part of defendants.

"To the Germania, Hanover, Niagara, & Republic Fire Insurance Companies, of New York.

"STATE OF SOUTH CAROLINA, *Kershaw District:*

"Be it known that, on this 14th day of Jan'y, A. D. 1867, before me, John K. Witherspoon, a magistrate duly commissioned and sworn, 64 residing in the town of Camden, district and State aforesaid, personally appeared B. E. Boykin, who, being duly sworn, deposes and says that the following statement, and the papers therein referred to, and signed with his own hand, contain a particular, just, and true account of the loss, in the words & figures following, to wit:

"I. That on the 21st of November, 1866, The Germania, The Hanover, Niagara, & Republic Fire Insurance Companies, of the city of New York, by their policy of insurance numbered 48, issued by W. D. McDowell, their agent at Camden, State of So. Ca., did each insure the party herein, and therein named, against loss or damage by fire, to the amount of one-fourth part of the sum of nine thousand five hundred dollars on 105,000 lbs. seed cotton, and five hundred dollars on gin-house, containing the seed cotton, in Kershaw District, So. Ca., for the term of three months from the 21st of November, 1866, to the 21st of February, A. D. 1867, at noon.

"III. That the actual cash value of the property so insured amounted to the sum of eighty-nine hundred dollars at the time immediately preceding the fire, as will appear by the annexed schedule, showing a full and accurate description of each kind of property, and the value of the same, with the damage or loss on each stated separately.

"IV. That the property insured belonging to R. E. Boykin con-
65 sists of a new gin-house, 32×40 feet, 22 feet high, & a
lint room valued at seven hundred dollars, and 105,000 pounds
seed cotton stored therein.

"V. That the building insured or containing the property destroyed or damaged was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit, as a storehouse for seed cotton, & for no other purpose whatever.

"VI. That, on the 27th day of December, 1866, a fire occurred, by which the property insured was injured or destroyed to the amount of eighty-nine hundred dollars as set forth in the statement and the several schedules & papers hereunto annexed, which the deponent declares to be a just, true, and faithful account of the loss so far as he has been able to ascertain the same.

"VII. That the fire originated at his gin-house; was the act of an incendiary; and the said deponent further declares that the said fire did not originate by any act, design, or procurement on his part, or in consequence of any fraud or evil practice done or suffered by him; and that nothing has been done by or with his privity or consent to violate the conditions of insurance, or render void the policy aforesaid.

"Witness my hand at Camden, in the district & State aforesaid, this 14th January, 1867.

"B. E. BOYKIN.

[Int. rev. stamp.]

66 "Subscribed & sworn to before me this 14th Jan'y, 1867.

"J. K. WITHERSPOON, *Magistrate.*

"STATE OF SOUTH CAROLINA, *County of Kershaw:*

"I, J. K. Witherspoon, residing in Camden, most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire or damage as alleged; and that I am well acquainted with the character & circumstances of the insured, and do verily believe that he has, by misfortune & without fraud or evil practice, sustained loss & damage on the property insured to the amount of eighty-nine hundred dollars.

"In testimony whereof I have hereunto set my hand & official seal this 14th January, A D. 1867.

[L. S.] "J. K. WITHERSPOON, *Magistrate.*

"SCHEDULE B.

"Germania, Hanover, Niagara, & Republic Insurance Companies of New York to B. E. Boykin, Dr.

"1866.

"Dec. 27th.	To 105,000 lbs. seed cotton burnt, @ 8	8,400
67	Cotton	$8,400
	1 new gin-house	500
		$8,900

"STATE OF SOUTH CAROLINA, *Kershaw District:*

"Personally appeared B. E. Boykin, Tho. J. Ancrum, & J. Ancrum before me, J. K. Witherspoon, a magistrate in and for the State & district, who, being duly sworn, on oath say that they believe that there was one hundred and five thousand pounds of seed cotton contained in the gin-house of B. E. Boykin, which was burnt on 27th Dec'r, 1866.

(Signed) "B. E. BOYKIN.
" "THO'S J. ANCRUM.
his
"J. + ANCRUM.
mark.

"Sworn before me this 14 Jan'y, 1867.
"J. K. WITHERSPOON, *Magistrate.*"

Witness testified that the portion of the proofs not filled up in his handwriting was done in the magistrate's office; that after witness filled up a portion of the paper shown to him, he gave it to Boykin; that the papers introduced are the papers referred to in the letter, and were handed to witness by Boykin on the 14th or 15th, and were forwarded by witness to New York on the 15th. Witness proved the handwriting of Boykin in the proofs of loss. Witness has no doubt
68 all the papers shown him, viz, Exhibits A & B, contain the signatures of Boykin, and testified that he received them as such.

Testimony of Dinah Brown, on commission.

* * * * * * Heard the people saying, near a month before the burning, that Jack Ancrum would burn it; never heard Jack Ancrum say so; don't know why nor for what it was said he would burn it. * *

Testimony of Tom Brisbane, on commission.

* * * I told Mr. Boykin that Jack had told that, a month before that, if he was not paid he would burn up all the crop; never told Mr. Boykin this before that day in Camden. * * * * Jack was suspected, and suspected by all wit. heard talk. Boykin suspected Jack, because he heard that Jack said he would burn it. Sam. Boykin said next morning he believed Jack had done it, because he was mean enough. * * Never talked with Boykin about it, except in Camden, as stated. * * * * * * * *

Ans. 1. I can't say that Mr. Boykin ever heard that Jack threatened or said he would burn it until after it was burnt.

I never talked with Burwell Boykin about the burning except the time I met him in Camden, after the burning of the gin-house. * * *

69 *Testimony of Muggie Hopkins, on commission.*

Ans. 4. * * * * Was talked on the plantation among the colored people for a month before Christmas, that Jack said if he was not paid he would burn up the cotton. I never heard Jack say so. Jack was suspected. Burwell Boykin suspected Jack, and the colored people too.

13. And the plaintiff, in reply to the evidence of the said defendants, and to rebut the same, gave in evidence the following testimony:

THOMAS J. ANCRUM, a witness for the plaintiff, recalled.

Direct examination by Mr. De Pass:

Q. Were you in Camden with B. E. Boykin the day he was with Mr. Hosmer at Witherspoon's office?
A. I was.
Q. Did you go into Witherspoon's office with B. E. Boykin?
A. I went by request of B. E. Boykin up into the office with him.
Q. Who was in that office?
A. Mr. Witherspoon, Mr. Hosmer, Mr. Boykin, & myself.
Q. (By Mr. Barker.) What was the date?
A. I do not recollect the date, but it was the day he was with Mr. Hosmer. It was the first time I ever met Mr. Hosmer.
Q. What did you hear Mr. Hosmer say on that occasion?
70 A. Mr. Hosmer was asking Boykin a great many questions, and repeating to Mr. Witherspoon to write.
Q. From what?
A. From his dictation, I thought.
Q. Whose dictation?
A. Mr. Hosmer's.
Q. When Mr. Witherspoon had finished writing, did you hear Mr. Witherspoon read over to Boykin what he had written?
A. I did not.
Q. Did he read over the affidavit that he had written?
A. No, sir; not in my presence. I knew nothing of that affidavit until I saw it here last year.

(Defendants' counsel (Mr. Barker) objected to the course of this testimony, and to similar questions which would be asked as to any other matter calculated or intended to dispute the affidavit of Boykin as a genuine deposition by him, the plaintiff in this cause, on the ground—

First. That he is estopped by his own signature and the certificate of the magistrate, recording and putting the seal upon his own statemen from disputing it in law; and

Secondly. He is in law estopped as the plaintiff in this suit from
puting that affidavit as his affidavit, or anything connected with it
cause the instrument was given as part of his examination under h,
was a condition of his policy, and required of him by his y,
71 and rendered by him as part of his preliminary proofs of in
compliance with and in performance of the conditions of his icy
precedent to his right of action, and accepted by the companies a ch
compliance and performance.

The court overruled the objections, and admitted the testimony

Defendants' counsel excepted.

Defendants' counsel took the additional objection that the examination was an attempt to impeach the certificate of the magistrate who had taken the affidavit and certified to it, which magistrate was one of the plaintiff's own witnesses.

The objections were overruled by the court, and defendants' counsel excepted.)

Q. When Boykin was about to sign that affidavit, did he say anything to Hosmer?

(This question was objected to.

The court overruled as follows:

THE COURT: I rule that it is competent for these parties in any way to impeach that affidavit as having been obtained by seduction or false pretences, and as the act of a man then insane. What the effect of the testimony is, is another question.

Mr. Paul, counsel for defendants, said: "We object to each question on this point. The rule of the Supreme Court of the United States
72 is, that anything that is distinct in itself must be objected to, or
it cannot be taken advantage of in the Supreme Court. We simply wish an objection noted to each question. Let your honor overrule it, and we except."

Mr. Conner, of counsel for plaintiff, said: "We are perfectly willing that your honor should note an exception to everything we ask."

The witness then answered:)

A. He said, "Is it a trick?" or "Will it hurt me?" No; I meant to say, Is there any trickery about it?"

Q. What did Hosmer say?

A. He said there was nothing to hurt him.

Q. That was Hosmer's reply?

A. Yes, sir.

Q. Did Mr. Boykin then sign the affidavit?

A. He signed a paper.

(This testimony was objected to on the ground above stated. The objections were overruled, and defendants' counsel excepted.)

Q. State conversation that took place Boykin and Hosmer after that affidavit had been written.

(Defendants' counsel objected to the witness being allowed to testify to what Hosmer said.

BY THE COURT: The undertaking here is to impeach the affidavit, and to impeach Mr. Hosmer as the party through whom the affidavit
was obtained; and the question is, whether his subsequent conduct
73 may not throw light upon his conduct and motives at the time.
I admit the testimony on the ground that it is competent to introduce testimony which may truly interpret an act which has been done.

Defendants' counsel excepted.

The witness then answered as follows:)

A. After Mr. Boykin had signed the paper and was about to leave, Mr. Hosmer said to him, "Return in a half hour, and it will be all settled."

Q. What was the impression produced upon your mind by all that occurred in that office of Witherspoon's that day, resulting from what Hosmer said, and what Boykin said as to the result of the matter?

(Objected to.)

Q. What was the impression produced upon your mind when Mr. Hosmer said to Boykin, "Return in half an hour, and all will be settled?"

(Excluded.)

Q. What did you understand to be the object of the parties in visiting Mr. Witherspoon's office?

(Objected to.)

Q. Did you have any conversation with Hosmer in Boykin's presence?

(Objected to.)

BY THE COURT: The witness can state anything that was said by the parties to show what they went there for, but his impressions are not admissible.

74 Q. From the declarations of Hosmer, did you understand what you went into that office for?

A. I was requested by Boykin to go up with him and assist him in the settlement of the case, and then my impression was, after signing, that everything would be settled in a half hour, and I told Mr. Boykin to go back and get his money.

Q. Did you tell him that in presence of Hosmer?

A. I did.

Q. Right there?

A. Right at the door, sir.

Q. Did Mr. Hosmer on that occasion say anything in contradiction of that, when you said he must come back and get his money?

A. No, sir; he did not.

Q. What was Mr. Boykin's condition of mind on that occasion, when you were in Mr. Witherspoon's office?

(Defendants' counsel objected, under the declaration which contains the averments of performance by the plaintiff as a sane man, of all the conditions of the policy, to any testimony which tends to show the insanity of plaintiff at the times when such acts were performed.

The objection was overruled by the court, and defendants' counsel excepted.

75 The witness then proceeded:)

A. He was very much excited, indeed. I thought at the time that he was drinking, and I requested him not to take another drop, having no suspicion at the moment of his being in the state of mind he is at the present time, but I found immediately after I went down that he had not touched a drop of liquor before the settlement of the case.

Q. If you had known that Boykin, when he signed that affidavit, was signing a paper that would work to his prejudice, would you have permitted him to do it?

A. I should have used all the influence I could have got to bear.

Q. You would have stopped him?

A. I would have stopped him if I could.

The cross-examination of the witness was waived by defendants' counsel.

The plaintiff then offered the testimony of—

JNO. K. WITHERSPOON, as follows:

Q. Did Mr. Hosmer, Col. Ancrum, and Mr. Boykin come into your office on the 9th Jan'y, 1867?

A. I do not recollect the exact date, but they came there early in Jan'y, 1867.

Q. State what occurred in that office.

(Defendants' counsel objected to the testimony proposed to be
76 introduced, on the ground that, when an officer has performed an official act constituting part of plaintiff's proof of performance of the contract, he cannot be brought into court as a witness for plaint-

iff to impeach its validity or to set it aside, and thereby impeach the plaintiff's case.

The court overruled the objection, and defendants' counsel excepted. The witness then answered as follows:)

A. Mr. Hosmer, Mr. Boykin, and Mr. Ancrum came in. Mr. Hosmer observed that he had brought Mr. Boykin in there to make proof of loss of his cotton, and they went in and took an affidavit and left my place.

Q. Where was Boykin standing?

A. I was sitting fronting the wall. Mr. Boykin was sitting off to my left, and Mr. Hosmer was just behind me.

Q. What was the distance from Boykin to Hosmer?

A. I suppose they were some four feet apart.

Q. How far was Boykin from you?

A. Probably about the same distance to my left. Mr. Hosmer was standing immediately behind me.

Q. Did Mr. Hosmer ask questions of Mr. Boykin?

A. He did.

Q. When Mr. Hosmer asked questions, would Boykin answer?

A. He answered very low and indistinct.

Q. Then would Hosmer repeat to you what Boykin said?

A. Yes, sir; he repeated it in Boykin's hearing.

77 Q. And you wrote it down?

A. Yes, sir.

Q. Did Boykin dictate the answer to Hosmer's questions, and did Hosmer repeat the answers?

(Objected to.)

Q. Were Boykin's answers lengthy or brief?

A. Brief.

Q. What do you mean by being brief?

A. They were short. Mr. Hosmer asked the questions and Mr. Boykin answered them. Mr. Boykin spoke very indistinctly, and I once or twice turned round to him, and told him to speak louder. I didn't hear all that he said. Mr. Hosmer: "Mr. Boykin said so and so was the case," or gave such an answer, but it was in Mr. Boykin's hearing that he said so.

Q. When Boykin was about to sign that affidavit, did he say anything to Hosmer?

A. Yes, sir.

Q. What did he say?

A. I think the expression was, "Is there any catch in this thing," or something to that amount.

Q. What was Hosmer's reply?

A. He told him there was not.

Q. Then he signed it?

A. Yes, sir.

Q. Was there any further conversation between Hosmer & Boykin?

78 A. Yes, sir.

Q. What was it?

A. Mr. Boykin said he was going to Kirkwood to dinner. Mr. Hosmer said that in a half hour they could get this matter all fixed up. Boykin said he was going and could not stay. I turned around and advised him to stay. He said he would not, he was going to dinner.

Q. How came you to write that affidavit?

A. I did it at the request of Mr. Hosmer.

sioner of deeds, (nearest to the place of the fire, not concerned in
83 the loss as a creditor or otherwise, nor related to the assured,)
stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and the assured shall, if required, submit to an examination under oath by any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe to such examination when reduced to writing; and shall also produce their books of account and other vouchers; and all property hereby insured, whether damaged or not; and shall also produce certified copies of all bills & invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the companies; damage to property not totally destroyed shall be appraised by disinterested men mutually chosen by the assured and the companies; and the companies reserve the right to take the articles damaged at their appraised value; when personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quality and cost of each article, and upon each article the damage
84 shall be separately appraised, and the detailed report of the appraisers in writing shall form a part of the proofs hereby required; one-half of the appraisers' fees to be paid by the companies. In case of loss on property held in trust or commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified by them. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured, and until such proofs, declarations, and certificates are provided, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing, on the part of the assured shall cause a forfeiture of all claim under this policy"—shall be furnished before the loss was payable, which was to be "sixty days after due notice, and proofs of the same."

The rendition of these proofs is a substantial right of the company. They are conditions-precedent to claim, and must be furnished before a cause of action exists. If furnished, they are binding upon the insured, and he cannot dispute them. If not furnished before suit
85 is brought, the insured has no right to sue at all. Even though delivered, if they be not so furnished as to be binding upon the assured, they cannot be said to be rendered to the insurance companies in the sense of the contract.

If, then, the jury shall believe that, at the time of placing the "proofs of loss" in the hands of the companies, the plaintiff was insane so as not to be bound by the same, then there is no proof in this case that "the preliminary proofs of loss" were ever furnished to the companies, and the jury must find for the (defendants) companies.

2d. The position taken by the plaintiff in the declaration is that of complete performance of all the conditions of the policy, with no suggestion or averment of non-performance, and of excuse thereof, by reason of insanity or otherwise. Under this declaration it is not competent for the jury to consider the evidence of insanity offered by the plaintiff in reply to impeach the affidavit taken at the examination, under oath, before the magistrate submitted to by plaintiff, in part performance of the conditions of the policy.

3d. The plaintiff's position in evidence in support of his declaration was that of complete performance of all the conditions of his policy, with no suggestion of non-performance, and of excuse therefor, by reason of insanity or otherwise. The jury are not at liberty to consider
86 evidence of insanity, offered in reply by plaintiff to impeach his affidavit, referred to in the letter of A. Stoddart "as part of the papers of B. E. Boykin," and constituting part of his "preliminary proofs" required by the policy. The plaintiff cannot be allowed, in evidence in reply, to destroy his own proof of performance relied on in support of his declaration.

4th. The plaintiff, having introduced the letter of Stoddart, is bound by its contents, and cannot contradict his own witness.

5th. The acceptance of the plaintiff's proofs of loss, proved by the letter of Stoddart, assumes the sanity and truth of the affidavit of Boykin, and, to bind the companies, must be regarded as their acceptance of preliminary proofs from a sane man.

6th. If the jury accept the plaintiff's testimony of his own insanity after the first of January, 1867, the jury cannot find the performance of the conditions of his policy as alleged in the declaration. On the other hand, if the jury do not accept the plaintiff's testimony of his insanity on the 9th of Jan'y, 1867, the time of his examination under oath before the magistrate, the jury must take the statements of plaintiff in his affidavit, then sworn to and subscribed, as conclusive of the facts therein set forth.

87 But the court rejected each and every of the instructions prayed for by the defendants, and declined to instruct the jury in the words of the requests, and, in lieu thereof, instructed the jury as follows:

"There is no doubt, gentlemen, of certain facts in this case. There is no doubt of the insurance, to the amount expressed in the contract, of the cotton and the gin-house. There is no doubt of the fire, and that the fire consumed all the cotton in the gin-house and the gin-house, and that there was a total destruction of the property insured. What is the issue made here by these parties? The loss has been incurred, and demand has been made for the payment of the indemnity in satisfaction of the loss covered by the insurance. And what is the ground of the reply which is taken here? It is that the party plaintiff has concealed material facts; has suppressed facts known to him of a material character, and not known to the insurer. The main elements of evidence to substantiate that ground is the affidavit of Mr. Boykin, the plaintiff. Though it may be considered the main element, it is but an element in this case. The broad ground assumed is, that Mr. Boykin, at the time the insurance was effected, was aware of a special danger to his property, not the general danger which attached to that form
88 of property in the country, but some special danger, known to himself, and which he did not communicate to the company.

"Now, gentlemen, I am satisfied that, if it were limited to that issue of merit, every good citizen would feel perfect satisfaction in its determination. The question whether there has been, by the plaintiff, a formal compliance with the law (and I am not now pronouncing upon that point) may or may not form the basis of a defense on the part of the insurance companies in this case.

"But, touching the equities between these parties, touching the responsibility of the insurance companies, it being certain that the property has been destroyed, and that it possessed a certain value, the ground taken by the defendants in reference to the absence of formal proofs of

loss is a formal as distinguished from a meritorious ground of defence. It may be in the contract, (and I am speaking now without deciding that point;) but when fire has come and consumed the whole of the cotton, and the building in which it is stored, then the defence that the proofs were not made out in a certain form and manner is a formal and technical ground of defence to the claim, but, nevertheless, a very necessary defence for the company, and the taking of it a very wise precau-
89 tion on their part—a rule well to be observed and proper for their
defence; but still, when the facts are that the property has been destroyed, and the value of the property is known, the determination of the case upon that defence would leave the mind unsatisfied, and would leave the company subject to prejudice in the minds of the people.

"* * * * * I regard the question of concealment as the question, and I am happy that it is not the province of the court to solve it; that it is your duty to determine whether any fact has been concealed which was material to the issue, or whether any rumor was brought home to Mr. Boykin's mind, and affected his purpose in respect to insuring his property, which would have affected the determination of the insurer. It is for you to determine that matter.

"I feel that it would be wholly impossible for me to enter upon an analysis of the evidence, or to recall it to your memories. It has been so fully stated and so amply discussed, and every aspect of it presented by the ingenuity of counsel, that I must leave it to your intelligence to measure the weight of that evidence, and to say whether, in view of all the circumstances under which it has been given, and with the interest the parties have had in this matter, and the manner in which witnesses have testified, you are not justified in believing that the plaintiff,
90 Mr. Boykin, did suppress a fact material to the risk, and material
to the measures of the premium which the insurance companies would charge in taking the risk. If the plaintiff has concealed that which would have determined. the insurer not to insure, or determine him to ask a large measure for insurance, then the fact is material to this issue, and that defence taken by the defendant is made out. It is for the insurance company to establish that ground of defence. The onus of proof is upon them to do it. They escape their proper responsibility by making out that case. * * * * * The condition of Mr. Boykin's mind throughout the whole of this transaction, when he testified in his affidavit, and when he had the interview with Captain Place, enters into the consideration of this subject. * * * * *

"The condition of his mind when he had the interview with Mr. Hosmer, in the office of Mr. Witherspoon, is also a matter for you to consider and to determine how much weight you will attach to his statements under the circumstances * * * * * * * And it is for you, gentlemen, from all these elements which go to form and make up the general condition of his mind, to determine whether, at the time he made this contract, and up to the time when the property was de-
91 stroyed, he had or had not a contracting mind, and the in-
telligence to enable him to govern himself and his affairs. If you should come to the conclusion that he was not of a contracting mind at the time that contract was made, then the contract is void; but if you should come to the conclusion that at the time he made this contract, and up to the time this property was consumed, he had that degree of intelligence which enabled him to govern his affairs, and which commanded the confidence of all who knew him, then it is for you to say whether he was not capable of making the contract, and maintaining and carrying out and executing all the obligations upon him as an in-

telligent contracting party. * * * * * *

"And now, gentlemen, I come to that portion of the case which I have indicated to you as partaking af the nature of form. I do not mean to say that it may not have legal substance. I do not mean to say that it does not enter into this matter, and is not a portion of the legal substance of this case. I will give you an illustration. * * * * You cannot bring the United States into court on any matter of account, post office, custom-house, &c., &c., until you have presented the account to the proper Department, and the Department shall have been permitted
to pass upon it. That is an analogous case. * * * * But
92 that rule is not absolute. * * * * * * *

"If from any insuperable cause a party is prevented from doing that thing, he is excused for failing to do it; and here, if this party, after the loss had occurred, was by the visitation of God prevented from doing these formal acts, he is excused from doing them, and it is essential to justice that he should be excused. But he is not excused from making his case good in court. * * * * * * This special contract on the part of these insurance companies, and the special law of the United States touching those who have claims upon it, are both founded upon a very substantial ground; they have their justification, but if they are carried beyond the limit, if they reach to the point of asking impossibilities, that which is a very just ground of protection and a very proper shield becomes a spear to wound and destroy. * * * * * * * *

"Now, the United States does not prevent a man, who has been unable by sickness or death from presenting his claim for settlement, from coming into court by himself, or those who represent his claim, and establishing the justice of his claim by proper evidence, as has been sought to be done here by the plaintiff.

"Mr. Boykin is not relieved from proving to the satisfaction of the
jury the loss of his cotton and gin-house by fire, and the amount
93 of his loss. He has got to make that out to your satisfaction, if
you are to give him a verdict. What he is relieved from, if he be insane, is from doing that which he could not have done. If he were insane, he was relieved from making formal proofs before the company, because it was impossible that he should do it. * * *

"I instruct you that, assuming that Mr. Boykin was insane after Jan'y 1st, if, after what was done by him in the imperfect condition of his mind, with the assistance of his friends and Mr. Hosmer, and the books he had kept, and with the opportunity of Hosmer, the agent McDowell, of inspecting the premises and consulting people here, and looking into the whole matter, the insurance companies took the ground that they would not pay the loss because there had been a suppression or concealment of a material fact which would vitiate the contract, then the presentation of these proofs became immaterial.

"I say, supposing Mr. Boykin was insane, but with some perception of what was needed to be done; and he went on with the help of his friends in good faith, so far as he could act at all, and the agent of the
company was on the spot to make a full inquisition to see if there
94 was fraud, or concealment, or guile, and the agent then went to
the company, and they assumed the ground they did, it seems to me that, in point of merit, they rested their defence upon the point of concealment.

"I think that that is substantially and truly the point in this case.

"But, gentlemen, I take the responsibility of charging you that, when the company took the ground it did, the rendition of proofs in the manner demanded by the terms of the contract was made idle, because they forced the plaintiff into court, and put him to his proofs." * *

To the granting of which said instructions, and the refusal of those prayed for by the defendants, the defendants then and there, and before the jury had withdrawn from the bar, did except, and, inasmuch as the matters aforesaid do not appear by the verdict of the jury, prayed the court here to sign and seal this their bill of exceptions, which is accordingly done this 24th day of December, A. D. 1869.

[L. S.] (Signed) GEO. S. BRYAN,
U. S. Judge Dist. of So. Ca.

And on the 24th day of December, 1869, come again into court the parties aforesaid by their attorneys aforesaid:

2d postea.

95 Therefore it is commanded that the marshal of said district do summon forty-eight good and lawful men, to be drawn by ballot according to the directions of the act of Congress in such case made and provided, to be and appear before the justices of the said court, to be holden at Columbus on the fourth Monday of November next, by whom, & so forth, and who neither, & so forth, to recognize, & so forth, because as well, & so forth. And the same day given to the parties aforesaid, at the place aforesaid, before the justices aforesaid, come as well the said plaintiff, by Porter & Conner, his attorneys, as the said defendants, by Simonton & Barker, their attorneys; and the jurors aforesaid being demanded, some of them, to wit, W. C. Swaffield and eleven others, come, and being drawn by ballot, according to the directions of the said act of Congress, and sworn of the jury aforesaid to say the truth of the within contained, do on their oath say that the said defendants did promise and assume as the said plaintiff hath alleged, and they assess the damages of said plaintiff at ten thousand dollars, with interest from the 20th of March, 1867.

Judgment.

Therefore it is considered that the said plaintiff do recover against the said defendants eleven thousand nine hundred & forty-four $\frac{50}{100}$ dollars, and also the sum of eight hundred & forty-nine $\frac{50}{100}$ dollars
96 for costs & charges aforesaid, to the said plaintiff by the said court now here with his assent adjudged, which said costs and damages amount in the whole to twelve thousand seven hundred and ninety-four dollars, &c.; and be the said defendants in mercy, and so forth.

(Signed) PORTER & CONNER,
Pl'ff's Att'ys.

Judgment signed this 31st Dec'r, 1869.

DAN'L HORLBECK,
Cl'k Cir. Ct. S. C. D.

Fi. fa. signed 3d of Jan'y, 1870.

And now here at this day, to wit, this 31st day of December, 1869, the said Germania Fire Insurance Company, The Niagara Fire Insurance

Company, The Hanover Fire Insurance Company, & The Republic Fire Insurance Company produced here to the said court the writ of the said United States of America for the correcting of errors of and upon the premises, commanding the record & proceedings aforesaid of the judgment aforesaid so rendered, &c., with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday of December next; which said writ of error is in the words and of the tenor following:

Writ of error.

THE UNITED STATES OF AMERICA:

97 The President of the United States to the judges of the circuit court of the United States for the fourth circuit, in and for the district of South Carolina:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Burwell E. Boykin, of South Carolina, plaintiff, and The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, of New York, defendants, a manifest error has happened, to the great damage of said defendants, as by their complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected,
98 the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday in December, A. D. one thousand eight hundred and sixty-nine.

{ SEAL OF CIRCUIT COURT. }

DAN'L HORLBECK,
C. C. C. Dist. So. Ca.

(Indorsed:)

The defendants named in the within writ having given the bond and security required by law, which is approved, this writ is allowed to operate as a supersedeas to the judgment therein mentioned.

Witness my hand this 3rd January, A. D. 1870.

GEO. S. BRYAN,
U. S. Judge Dist. So. Ca.

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid so rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

99 *Bond.*

Know all men by these presents that we, The Republic Fire Insurance Company, The Hanover Fire Insurance Company, The Niagara Fire Insurance Company, and The Germania Fire Insurance Company, all of the city of New York, and State of New York, as principals, and Robert Adger, of the city of Charleston, and State of South Carolina, as surety, are held and firmly bound unto Burwell E. Boykin in the penal sum of twenty-five thousand dollars, lawful money of the United States of America, to be paid unto the said Burwell E. Boykin, or to his certain attorney, heirs, executors, administrators, and assigns; to which payment, well and truly to be made, the said fire insurance companies, and each of them, and the said Robert Adger, surety, hereby bind themselves, and each of them, the successors of said fire insurance companies, and each of them, and the heirs, executors, & administrators of the said Robert Adger, surety, jointly and severally, firmly by these presents, sealed with the corporate seals of the said fire insurance companies respectively, and with the seal of the said Robert Adger, surety, dated the 29th day of December, one thousand eight hundred and sixty-nine.

100 Whereas, on the 24th day of December, A. D. 1869, in the circuit court of the United States for the district of South Carolina, in the 4th circuit of the United States, the said Burwell E. Boykin, by the consideration and judgment of said court, did recover judgment in a certain action pending therein, in his favour as plaintiff, against said fire insurance companies as defendants, in his favor and against said fire insurance companies, for the sum of $12,794, damages and costs, as by the record thereof will more fully appear:

And whereas a writ of error from the Supreme Court of the United States has been sued out by said fire insurance companies for the purpose of reversing the said judgment, and application has been made to the Honorable George S. Bryan, district judge of the United States for the district of South Carolina, and a judge of said circuit court, to sign the citation upon the writ of error aforesaid, and the said fire insurance companies propose to give security thereon, as required by law, and to have said writ of error be and operate as a supersedeas, and stay execution of said judgment:

Now, therefore, the condition of this obligation is such, that if the said The Republic Fire Insurance Company, The Hanover Fire Insurance
Company, The Niagara Fire Insurance Company, and The Ger-
101 mania Fire Insurance Company, their successors and assigns,
shall prosecute the said writ of error to effect, and shall answer all damages & costs that shall be awarded against them if they fail to make their plea good, without any fraud or other delay, then this obligation to be void; and otherwise to be and remain in full force, effect, and virtue.

In virtue whereof the said Republic Fire Insurance Company has caused these presents to be attested by the signature of Rob't S. Howe, its president, and its corporate seal to be hereto affixed; and the said Hanover Fire Insurance Company has caused these presents to be attested by the signature of Benjamin S. Walcott, its president, and its corporate seal to be hereto affixed; and the said Niagara Fire Insurance Company has caused these presents to be attested by Peter Notman, its vice-president, and its corporate seal to be hereto affixed; and the said Germania Fire Insurance Company has caused these presents to be attested by the signature of Jno. Edward Kahl, its vice-president, and its corporate seal to be hereto affixed; and the said Robert

Adger, surety, has hereto set his hand and seal, the day and year first above written.

[SEAL.] REPUBLIC FIRE INS. CO.,
P'r ROB'T S. HOWE, *Pres't.*

Signed, sealed, & delivered in presence of—
E. W. ROWELL.

102 { SEAL HANOVE
FIRE INS. CO. } HANOVER FIRE INS. CO.,
P'r BENJ. S. WALCOTT, *Pres't.*
CHA'S A. SHAW.
[SEAL.] P. NOTMAN,
E. FORMAN. *V. Pres't Niagara Fire Ins. Co.*
[SEAL.] JOHN EDW'D KAHL,
CH. KUKHAVEN. *V. Pres't Germania Fire Ins. Co.*
In presence of— ROB'T ADGER. [L. S.]
THEOD. G. BARKER.

Approved by—

GEO. S. BRYAN,
U. S. Judge Dist. So. Ca.

3D JAN'Y, 1870.

Citation.

The United States of America to Burwell E. Boykin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein The Germania Fire Insurance Company, The
103 Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, of New York, are plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand & seal, at the city of Charleston, district aforesaid, this third day of January, A. D. 1870.

[SEAL OF COURT.] GEO. S. BRYAN,
U. S. Judge Dist. So. Ca.

Teste: DAN'L HORLBECK,
U. S. C. C. C. S. C. D.

CHARLESTON, *Jan'y 4th*, 1870.

I certify that I have this day served personally General James Conner, att'y of B. E. Boykin, with a copy of the within.

(Signed) E. PERRY BUTTS,
U. S. Dep'y Mars'l.

104 U. S. CIRCUIT COURT,
So. Carolina District, Clerk's Office:

I, Daniel Horlbeck, clerk of the circuit court of the United States for said district, do certify that the foregoing 104 pages of writing contain a true and complete copy and transcript of the record and proceedings had in said court in the judgment in which Burwell E. Boykin was plaintiff, and The Germania, The Niagara, The Hanover, and The Republic Fire Insurance Companies were defendants.

Witness my hand and the seal of said circuit court this twenty-sixth day of July, one thousand eight hundred and seventy.

[SEAL.] DAN'L HORLBECK,
C. C. C. U. S. for S. C.

105 THE UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the fourth circuit, in and for the district of South Carolina:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Burwell E. Boykin, of South Carolina, plaintiff, and The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, of New York, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that,
106 the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] DAN'L HORLBECK,
C. C. C. U. S. for S. C.

107 (Indorsed:) Ent'd cir. doc., folio 11, January 4, 1870, L. E. Johnson, U. S. M. The Germania Fire Insurance Co., The Niagara Fire Insurance Co., The Hanover Fire Insurance Co., The Republic Fire Insurance Co., of New York, vs. Burwell E. Boykin, of South Carolina. Writ of error. Filed 3 Jan., 1870.

The defendants named in the within writ having given the bond and security as required by law, which is approved, this writ is allowed to operate as a supersedeas to the judgment therein mentioned.

Witness my hand this third day of January, A. D. 1870.

GEO. S. BRYAN,
U. S. Judge Dis. of S. Ca.

108 The United States of America to Burwell E. Boykin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of

South Carolina, wherein The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, of New York, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal, at the city of Charleston, in the district aforesaid, this third day of January, A. D. 1870.

[SEAL.]

GEO. S. BRYAN,
U. S. Judge Dis. of S. Ca.

Teste: DAN'L HORLBECK,
C. C. C. U. S. for S. C.

109 (Indorsed:) Ent'd cir. doc., folio 11, January 4, 1870, L. E. Johnson, U. S. marshal. The Germania Fire Insurance Co., The Niagara Fire Insurance Co., The Hanover Fire Insurance Co., The Republic Fire Insurance Co., of New York, vs. Burwell E. Boykin, of South Carolina. Citation, original. Filed 3 Jan., A. D. 1870.

We accept service of this citation for the plaintiff, Burwell E. Boykin, and for all the counsel on record.

CHARLESTON, S. C., *Jan'y 4th*, 1869.

I certify that I have this day served personally Mr. James Connor, att'y of Burwell E. Boykin, with a copy of the within.

E. PERRY BUTTS.

(Indorsement on cover:) No. 495. The Germania Fire Insurance Company, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and The Republic Fire Insurance Company, of New York, plaintiffs in error, vs. Burwell E. Boykin. S. Carolina C. C. U. S.

Filed 17th October, 1870.

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In the Supreme Court of the United States.

The Germania, Hanover, Niagara, and Republic Insurance Cos.
vs.
Burwell E. Boykin.

This cause comes up by writ of error to the Circuit Court of the United States for the District of South Carolina.

General View of the Case.

Each of the four insurance companies, plaintiffs in error, by a single instrument of writing, issued by an agent of them all, insured the defendant's property near Columbia, S. C., against fire, to the amount of one-fourth part of the sum of ten thousand dollars. Record, p, 4.

The insurance was made on the 21st day of November, 1866—the property was burned on the 27th day of December, 1866. On the ninth day of January, 1867, a general agent of the company being at Camden, the local agent sent for the plaintiff to meet the general agent and undergo an examination as to the loss, which examination, by the terms of the policy, he was bound to submit to. The plaintiff came accordingly, and was examined by the general agent before a justice of the peace, who wrote down his statement, which the plaintiff then signed. This was forwarded to the companies in New York, with other papers containing preliminary proofs of loss required by the policy. To which the said companies replied that the papers forwarded showed that the plaintiff had no just claim against the companies, and refused payment.

The plaintiff then brought suit against the four companies jointly for the whole amount issued, laying his damages at $20,000. Rec. pp. 1, 12.

His original declaration contained four counts, (three of them common counts in assumpsit,) and being demurred to the demurrer was sustained as to all four counts, and they are therefore out of the case.

An amended declaration was filed containing two counts, both being special upon the policy, and averring performance of all things on his part to be done and performed.

Upon trial the jury gave a verdict against all the defendants jointly for $10,000 with interest from March 20, 1867, and the court rendered judgment against them for $11,944 50 and $849 50 costs. Record, p. 38.

I.

The first error assigned is that the action was sustained and judgment given against all the defendant companies jointly upon the agreement set up in the declaration.

That agreement consisted of two instruments of writing.

The first, called the certificate of insurance, (Record, p. 4,) is set forth in the first amended count to the effect that the defendants on the 21st of November, 1866, by said certificate, did each insure the said plaintiff against loss or damage by fire to the amount of one-fourth part of $10,000, (Record, p. 6,) subject to the conditions of open fire policy, 812, which also is set forth in the said count.

In this open policy it is declared that the said companies, "each acting and contracting for itself, and not for the other or others, in consideration of one-fourrh part of the respective sums to be specified as premiums," &c., (Record, p. 6,) agreed to make good the damage "not exceeding in amount the sum insured by such company as aforesaid, &c." (Record, p. 7.) And "it is further understood and agreed by and between the parties hereto that nothing herein contained shall be construed as creating or importing any joint liability on the part of the above-named companies, or either of them, but that each of said companies shall be regarded as only severally liable upon this policy for the amount insured by each under the same in the same manner, and not otherwise, as if each had issued its separate policy for the proportionate amount which each insures as above mentioned. Record, p. 10.

The second count is to the same effect. Record. pp 11, 12.

Upon this the judgment of the court is at p. 38 of the record jointly for the whole amount of loss and interest.

It is manifest that this judgment is not supported by anything alleged in the declaration. It purports to establish the liability of each of the said companies for the whole sum insured by them all in several and distinct portions. This is manifest error for which the judgment might have been arrested on motion, and for which it must be reversed here.

There appears at page 4 of the record the following statement or certificate apparently by the club:

> "And Simonton & Barker, counsel for defendants, made the following indorsement upon the declaration:
>
> "This action, by the consent of the undersigned, was brought jointly instead of severally.
>
> "SIMONTON & BARKER,
> "Per CHAS. H. SIMONTON."

When this endorsement was made does not appear. But whether made before or after the trial plainly it could not authorize this judgment. Whether it could be held to waive the error of bringing the action as upon a joint agreement for the sum of $10,000, which need not be discussed here, it cannot be maintained that it could have the effect of converting the several undertakings of the four companies, each for the sum of $2,500, into a joint undertaking for the full sum of $10,000, upon which each would be liable for the whole, in the face of the distinct and express terms of the contract to the contrary. Nor could such have been its intention, for that would have been *ultra vires* of the counsel, and therefore void. To attempt it would have been a manifest breach of duty. What the counsel undoubtedly meant was that one action should settle the rights of all the parties according to their respective liabilities. It does not appear to have been brought to the notice of the court. At all events the record shows a declaration setting forth the true agreement, and the judgment is utterly incompatible with it.

Nothing could support the judgment but a different contract from that declared on, and if the supposed consent of counsel had the effect of such new contract it ought to have been declared on.

II.

There was error in refusing the instructions asked for by the defendant.

Upon the trial of the cause the plaintiff having proved the contract of insurance the furnishing of preliminary proofs and the loss, rested.

The defendants then put in evidence the affidavit which the plaintiff had made when examined by the agent in Camden, in which he stated that he believed the fire to have been the act of an incendiary; that he had heard of threats being made by one of his laborers whom he had discharged, intimating that he would burn the cotton, and that in consequence of those threats he, the plaintiff, had effected the insurance. (Rec. p. .) The defendants then proved also that these threats had not at any time been made known to the companies, either by the assured or any other person, at any time before the loss.

Thereupon the plaintiff offered evidence to prove that he was insane at the time he made the damaging admissions in question and produced a record of proceedings on writ *de lunatico inquirendo*, in which, on the seventh of April, 1867, he was found to be a lunatic.

The defendants then objected, that by the terms of the policy the assured could not sue until sixty days after furnishing the preliminary proofs, and that he had averred the performance of this condition, and that the defendants had acted upon his statements made in the course of such performance, and as part thereof, and that either he could not be heard to deny the truth of the statements so made by him, or if he should in fact prove himself incompetent to make any statement on the subject, that then he had not fulfilled the condition of the policy, and could not maintain the action.

This point is the foundation of the first three instructions asked by the defendants. (Rec. pp. 34, 35.) Which were refused. Rec. p. 35.

In this the court erred. The policy stipulated for and secured to the insurers the benefit of the statements of the insured under oath, as to certain facts material to the decision of the insurers as their further acts—whether they should pay and how much was due.

If this stipulation was performed by furnishing such statements, then the insurers had a right to rely on them, and consequently, the insured cannot dispute them. (*Young* vs. *Excelsior Ins. Co.*, 1 Bosw., 507.) If this be otherwise; if the plaintiff may show that his statements as furnished were the mere fancies of a madman, then they do not constitute a performance, and the insured cannot recover on a declaration avering performance. He shall have declared on the special facts in excuse of non-performance. If this be not so, then the plaintiff may send forward to the companies any bundle of waste paper, and after waiting sixty days commence his action and recover.

III.

There was error in the instructions given. The long address of the judge at p. 35, though in the form of a charge, is stated in the bill of exceptions to have been an

2 Peters 53

instruction to the jury, given by the judge in lieu of the one prayed by the defendant upon the evidence therein set forth—and so must be taken in that light.

The judge instructed the jury that when the company took the ground it did, [in the letter refusing to pay, Rec., pp. 23, 24,] the rendition of proofs [of loss], in the manner demanded by the terms of the contract was made idle, because they forced the plaintiff into court and put him to his proofs."

If the defendant, by taking the ground referred to, dispensed the plaintiff from performance, that would not sustain the averment of performance in a declaration. It might have been pleaded and proved in excuse of performance.

IV.

The whole instruction is objectionable as evidently leaning against the defence, and calculated to prejudice the jury in that direction. The whole tendency of it is to prevent the jury from giving any weight to the representations made by the assured after the loss occurred.

V.

There was error in admitting affidavits offered by the plaintiffs, as affidavits made by witnesses who had been examined under commission, to contradict or discredit their own testimony. Record, pp. 27, 33.

CONCLUSION.

We submit the judgment should be reversed and a venire, *de novo*, awarded.

J. M. CARLISLE,
J. D. McPHERSON,
For Plaintiff in Error.

Supreme Court of the United States.

Germania Fire Insurance Co. *et al.*
vs.
Burwell E. Boykin.
No. 256.

BRIEF OF DEFENDANT IN ERROR.

1. The exceptions to the testimony of Ancrum are made upon the theory, that evidence is not admissible to show that the affidavit of Boykin was vitiated by fraud.

This affidavit of Boykin, after making a recital of the destruction of the property insured, states a fact, viz, that Boykin insured his property because he was afraid one Jack, a freedman, would burn his gin-house and its contents, (the property insured.) This fact, if true, would vitiate the policy of insurance, as being a fraud on the insurance companies. Ancrum was introduced to prove certain facts occurring at the time the affidavit was prepared, which tended to show that this statement was interpolated in the affidavit by the fraud of one Hosmer, the agent of the insurance companies.

Clearly the evidence was admissible.

Attesting witness to a will admissible to disprove the sanity of the testator.

Stock on Non Compos Mentis, pp. 37, 560.

Fraud vitiates any, even the most solemn, transactions.

United States *v.* The Amistad, 15 Pet.

A judgment obtained by fraud is not conclusive.

Pratt *v.* Northam, 5 Mason, 95.

Fraud in the execution of an instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.

Hartshorn *et al.* *v.* Day, 19 How., 223.

Parol evidence admissible to show that an instrument is altogether void, or that it never had any legal existence or binding force, by reason of fraud.

1 Greenleaf on Evidence, § 284, p. 320.

A record, a deed, or a writing without seal, is alike void if obtained by fraud. (*Id.*)

Fraud in procuring a deed may be proved by parol evidence and the circumstances attending it.

Blake *v.* Marvell, 2 Ball & B., 47.

The general rule is, that fraud may be proved as well at law as in equity. It rests with the plaintiffs in error to show that there is something peculiar in the nature of the affidavit, which excludes such evidence in this case.

We do not perceive any such matter peculiar in this affidavit to exempt it from attack on the ground of fraud.

2. The exceptions taken to the evidence of Witherspoon, the magistrate before whom the affidavit was taken, proceeds upon the theory that, being the judicial officer before whom the affidavit was taken, he cannot prove any facts occurring at the time of taking the affidavit, from which fraud may be inferred in the making of the affidavit.

It is not easy to see upon what ground this exception is taken.

When it is considered that the most solemn matters of records, even judgments of the highest courts, may, on proper proceedings, be examined into and avoided for fraud, it is difficult to see why the evidence excepted to was not admissible.

It is to be noted, it was not proposed to prove any fact inconsistent with the magistrate's certificate to the affidavit.

It was only proposed to prove the facts attending the taking of the affidavit. It is the light thrown upon these facts by the lunacy of Boykin, subsequently found on the inquisition of lunacy, that induces the belief that the affidavit did not truly represent the meaning of the affiant, Boykin.

There is nothing in the circumstance that Witherspoon prepared the affidavit, when there was no suspicion as to the sanity of Boykin, which prevents him from stating what really occurred on that occasion.

Parol evidence admissible to reform a writing on account of fraud.

Fisher *v.* Derbert's Adms., 34, Penn., 460.

To establish an estoppel *in pais*, it must appear that the party seeking to set it up was misled or injured by the transaction.

Diller *v.* Burbaker, 52; Penn. St., 498.

An estoppel *in pais* must be mutual, and the act constituting the estoppel must have been acted upon by the party pleading the estoppel.

Louis *v.* Castleman, 27 Texas, 407.

An estoppel can never be allowed where it would itself perpetrate fraud, work injustice, or fail to protect the innocent.

Mills *v.* Graves, 38 Ill., 455.

A married woman is not barred by an estoppel *in pais.*

Lowell *v.* Daniels, 2 Gray, 161.

To admit such estoppel would be to do away with the limitations the law has imposed on infants and married women. (*Id.*)

3. The exception to the admission of the inquisition of lunacy.

This objection was certainly not well taken.

An inquisition of lunacy taken after the execution of a bond, finding that testator had been a lunatic at a period prior to the execution of the bond, is admissible. Per Lord Ellenborough, holding, that although the inquisition was not conclusive on the then issue, it was admissible.

Faulder *v.* Selk *et al.* Exs., 3 Campbell, 126.

In Sergeson *v.* Sealey, (2 Atkins, 412,) Lord Hardwicke admitted in evidence an inquisition which went back eight years, thus covering the period at which a purchase of land had been made. He held it admissible, but not conclusive.

Inquisitions admissible in evidence.

1 Greenleaf's Ev., sec. 556, p. 592–593.

4. As to the exception taken to the introduction in evidence of the affidavit of Tom Brisbane, Maggie Hopkins, and Dinah Brown, it is sufficient to say, that the affidavit was wholly immaterial, as these parties did not depose, when examined by defendants below, that Boykin suspected Jack before the burning.

In Turner *v.* Fendall, (1 Cranch, 116,) it is held, "that it is not error to reject legal evidence of an irrelevant fact." By parity of reasoning, it is no error to admit illegal evidence of an irrelevant character.

An error by which the plaintiff in error could not have been injured is not ground for reversal.

Blackwell *v.* Patton, 7 Cranch, 471.

Although an error appear on the record, yet if, in distinct pleadings, a complete bar is shown to the action, the judgment must be affirmed.

United States *v.* Carlton, ——

We wish it to be understood, as a general rule, that where there are various bills of exceptions filed, if in the progress of the trial the matters of these exceptions become wholly immaterial to the merits, as they are finally made out at the trial, they are no longer assignable as errors.

Upon this ground we shall pass over the exceptions taken to the rulings of the court in the preliminary stages of the cause as to the title of the lessor of the plaintiff.

Per Story, J., delivering the opinion of the court in Greenleaf's Lessee *v.* Birth, 5 Peters, 134:

"We conclude that it is a sound principle, that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made."

Deery *v.* Cray, 3 Wallace, 807.

The subject-matter of the fourth exception became wholly immaterial in the progress of the cause, and could not be assigned for error.

Philadelphia, Wilmington, and Baltimore R. R. *v.* Howard, p. 333.

To warrant reversal there must be not only error in the record, but the error must be such as may have worked injury to the party complaining.

Brobst *v.* Brock, 10 Wallace, 519.

"If, for any reason appearing in the record, it is clear that the plaintiff in error, who was also plaintiff below, cannot recover, the court will not determine whether error was committed in instructions given respecting other parts of the case." (*Ibid.*)

"The erroneous instruction of the court, in regard to the effect of a deed of mortgage, on the plaintiff's title, is no ground for reversal, when this court can see that the plaintiff had no title on which the jury could have found in his favor."

Deery *v.* Cray, 10 Wallace, 263.
Citing Ryder *v.* Wambwell, 4 Exchequer, (Law Reports, 32.)

It is to be noted, however, that evidence of the character of this excepted to, is held to be admissible in Massachusetts, Maine, Connecticut, Vermont, New Hampshire, and New York. (See cases cited in 1 Greenleaf's Ev., sec. 462, note, refering to Gould *v.* Norfolk Lead Co., 9 Cushing, 338.)

Commonwealth *v.* Hawkins, 3 Gray, 463.
Tucker *v.* Welsh, 17 Mass., 160.
Titus *v.* Ash, 4 Foster, 319.
Hedge *v.* Clapp, 22 Conn., 622.
Robinson *v.* Hutchinson, 31 Vt., 443.
Howland *v.* Conway, 1 Abbott Adm., 281.

5. As to the instructions prayed for and refused. They assumed that if the plaintiff below was insane in January, no preliminary proofs of loss were given in law.

These instructions were properly refused in several aspects.

(*a*) If the plaintiff was insane, yet the notice given was sufficient.

"If the parties have contracted in the words they have used, that notice shall be delivered; then, if the fact is, that notice is given by the parties, all is given which the parties have agreed to be done." This was holding that a notice of dissolution was good, though the partner on whom it was served was lunatic at the time.

By the Vice Chancellor, in Robertson *v.* Lockie, 10 Jurist, 533.

(*b*) If the plaintiff below was insane, he was excused from giving notice.

Mr. Parsons says: "We cannot but think, however, that the law, especially if it were construed by the general principles of insurance, would say that death by his own hands (the insured) did not legally include a death which was self-inflicted, but not with the concurrence or action of a responsible mind or will."

2 Parsons on Contracts, p. 476.
Breasted *v.* Farmers' L. and I Co., 4 Hill, (N. Y.,) 73.

If the performance of a contract becomes impossible by the act of God, it should seem this would be a sufficient defense.

2 Parsons on Contracts, p. 672.

The death or sufficient illness of the party, (bound to give notice of the non-payment of an indorsed note,) or any sufficient accident or obstruction, will excuse the want of notice.

1 *Ibid.*, p. 278.

Where insured insane, but ignorant of it, the life policy held good.

2 *Id.*, 466.
Swete *v.* Fairlie, 6 Car. & P., 1.

(*c*) If he was not insane when notice given, it was good.

(*e*) Objection to pay on the merits dispensed with the formal preliminary proofs.

Where insurance company refused to issue a policy, denying their responsibility altogether, this is considered a waiver of preliminary proofs of loss.

Tayloe *v.* Merchants' Insurance Co., 9 Howard, 390.

Denial of liability dispenses with the right to formal proof of loss.

Norwich Transp. Co. *v.* Western Mass. Ins. Co., 34 Conn., 561.
Phœnix Ins. Co. *v.* Taylor, 5 Minnesota, 492.

The provision requiring notice and proof of loss is to be expounded liberally in favor of the assured.

Walsh *v.* Washington Ins. Co., 32 N. Y., 427.

If the preliminary proofs are waived, such waiver, in effect, strikes them out of the contract.

Commonwealth Ins. Co. *v.* Sennett, 41 Penn. Rep., 161.

Refusal to pay for matter of substance is a waiver of preliminary proof.

Insurance Company *v.* Coates, 14 Md., 285.

If insurance company intend to, rely on defects in preliminary proof of loss, they should put their refusal on that ground, and their neglect to do so is a waiver of any such objection.

Firemen's Ins. Co. *v.* Crandall, 33 Ala., 9.

When agent of company expresses satisfaction with preliminary proof of loss, company bound by it.

Insurance Company *v.* Wright, 22 Ill., 462.

Refusal to pay loss on substantial grounds dispenses with formal proofs of loss.

Noyes *v.* Washington Ins. Co., 30 Vt., (1 S.,) 659.
Schenck *v.* Mercer County Ins. Co., 4 Zabr., (N. J.,) 447.

When preliminary proofs are presented, the company must *then* except to their regularity.

Billough *v.* Metropolis Ins. Co., 5 Duer, (N. Y.,) 587.
Peacock *v.* New York Ins. Co., 1 Bosw., (N. Y.,) 338.
Kernockan *v.* New York Bowery Ins. Co., 17 N. Y., (3 Smith,) 428.

Stipulation that the affidavit of loss should be made before nearest magistrate, is directory, not essential.

Ætna Ins. Co. *v.* Miers, 5 Sneed, (Tenn.,) 139.

6. As to the question of jurisdiction.

A citizen of the State where the suit is brought may sue a citizen of another State in the circuit court.

Harmon *v.* Rowan, Pet. C. C., 489.
Kitchen *v.* Strawbridge, 4 W. C. C., 84.

The act of 1839 enables a party defendant, who may not reside in the district, voluntarily to become a *party* to the suit without ousting the jurisdiction.

Tayler *v.* Cook, 2 McLean, 516.

A corporation, created by and transacting business in a State, is to be considered an inhabitant of that State, capable of being treated as a citizen for all purposes, suing and being sued in a circuit court.

Louisville R. R. Co. *v.* Letrow, 2 H., 497.
Marshall *v.* Baltimore and Ohio R. R. Co., 16 How., 314.
Ohio and Mississippi R. R. Co. *v.* ———, 1 Black, 286.

The form of the judgment is a matter of practice, to be corrected in the court below, and is not matter of error.

W. W. Boyce,
Counsel for Defendant in Error.